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IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

CARPENTERS HEALTH AND WELFARE TRUST FUND FOR CALIFORNIA, CARPENTERS PENSION TRUST FUND FOR NORTHERN CALIFORNIA, CARPENTERS VACATION AND HOLIDAY TRUST FUND FOR NORTHERN CALIFORNIA; CARPENTERS APPRENTICESHIP AND TRAINING TRUST FUND FOR NORTHERN CALIFORNIA; and CARPENTERS ANNUITY TRUST FUND FOR NORTHERN CALIFORNIA,
Petitioners,

v.

TRI-CAPITAL CORPORATION; MARK DIVERSIFIED, INC.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Under Section 515 of the Employee Retirement Income Security Act of 1974, as amended ("ERISA"), may a contractor that agreed in writing to make contributions on behalf of its subcontractor avoid its obligation to do so on the ground that it is neither a fiduciary nor an "employer," defined by ERISA as a person "acting on the interest of an employer?"

2. Does ERISA preemption under Section § 514(a), 29 U.S.C. § 1144(a), provide federal question jurisdiction for removal, or dismissal, of a state law cause of action against a party that cannot be sued under ERISA § 502(a)?

LIST OF PARTIES

The parties to the proceeding below and before this Court are:

1. Carpenters Health and Welfare Trust Fund for California, Carpenters Pension Trust Fund for Northern California, Carpenters Vacation and Holiday Trust Fund for Northern California, Carpenters Apprenticeship and Training Trust Fund for Northern California and Carpenters Annuity Trust Fund for Northern California.

2. TRI-Capital Corporation.

3. Mark Diversified, Inc.

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The Carpenters Health and Welfare Trust Fund for California, Carpenters Pension Trust Fund for Northern California, Carpenters Vacation and Holiday Trust Fund for Northern California, Carpenters Apprenticeship and Training Trust Fund for Northern California and Carpenters Annuity Trust Fund for Northern California (hereinafter "Carpenters Trust Funds" or "Trust Funds") respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on June 3, 1994.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Ninth Circuit (Appendix A, *infra*) is reported at 25 F.3d 849. That court's order denying Petitioner's petition for rehearing and rejecting Petitioners' suggestion for rehearing *en banc* (Appendix D, *infra*) was filed on July 13, 1994. The orders of the district court for the Eastern District of California (Appendix B and C, *infra*) were filed on May 21, 1991 and January 3, 1992, respectively, and are not reported.

JURISDICTION

The Court of Appeals entered its judgment and opinion on June 3, 1994. A timely petition for rehearing and suggestion for rehearing *en banc* was filed on June 17, 1994. The petition for rehearing was denied and the suggestion for rehearing *en banc* rejected on July 13, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). This Petition is timely filed pursuant to 28 U.S.C. § 2101(c).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are:

1. The Employee Retirement Income Security Act of 1974, as amended ("ERISA"), Sections 3(5), 502, 514 (a) & 515, 29 U.S.C. §§ 1132, 1002(5), 1144(a) & 1145.

2. California Civil Code Sections 1559, 3111, 3159, 3162 & 3172.

Pertinent portions of these statutory provisions are reproduced at Appendix E, *infra*.

STATEMENT OF THE CASE

The Carpenters Trust Funds are multiemployer benefit plans established pursuant to the Employee Retirement Income Security Act of 1974, as amended ("ERISA"),

29 U.S.C. §§ 1001-1461, that exist to provide pension, health and other benefits to carpenter participants and their beneficiaries. The Trust Funds were created by a collective bargaining agreement and trust agreements between the Carpenters 46 Northern California Counties Conference Board ("Carpenters Union") and various multiemployer associations representing construction industry employers. Funding for the Trust Funds comes from contributions specified in the collective bargaining agreement and the trust agreements, which require the contributions to be paid in by employers on account of hours of covered work performed by carpenters. The Trust Funds stand as third party beneficiaries to the collective bargaining agreement and have a duty under the trust agreements, and under ERISA, to take action to collect unpaid contributions. Payment of contributions is also required by ERISA § 515, which specifies that "[e]very employer who is obliged to make contributions to a multiemployer plan" shall do so, 29 U.S.C. § 1145.

In this case the direct employer, who had signed the collective bargaining agreement, was insolvent, and the Trust funds sought to collect contributions from two non-signatories, a construction lender, TRI-Capital Corporation ("TRI-Capital") and the general contractor on the project, Mark Diversified, Inc. ("Mark Diversified"), which had a written agreement to pay the benefit contributions on behalf of its subcontractor, the direct employer.

The Trust Funds proceeded first against the lender, by serving TRI-Capital with a bonded stop notice, which, under California law, required withholding of amounts due for work by carpenters on the project. To enforce the stop notice, the Trust Funds filed a complaint under State law in the county where the property under construction was located. The action was removed to federal district court on grounds of federal question jurisdiction based on federal preemption under ERISA Section 514(a), 29 U.S.C. § 1144(a). The Trust Funds moved for remand,

based upon lack of federal jurisdiction over a purely State law construction remedy against a lender, *Carpenters Southern California Administrative Corp. v. Majestic Housing,* 743 F.2d 1341 (9th Cir. 1984), and because the ERISA preemption doctrine does not provide federal jurisdiction for removal except in actions for benefits under ERISA § 502(a)(1)(B), which may be brought in either state or federal court. *See Metropolitan Life Insurance Co. v. Taylor,* 481 U.S. 58, 63 (1987).

The district court denied remand and granted Respondents' motion to dismiss, with leave to amend, under Rule 12(b)(6), Fed.R.Civ.P., on the ground that ERISA "completely preempts and supplants" the State law claim against lender TRI-Capital, App. B, *infra* at 30a-31a. The Trust Funds then filed a First Amended Complaint in the district court, adding claims against general contractor, Mark Diversified, based on federal and state law, and retaining the California stop notice claim against the lender, in order to preserve its right to appeal that issue from a final order. The federal claim alleged that the Trust Funds were third party beneficiaries to a written agreement between Mark Diversified and its subcontractor in which Mark Diversified had agreed to make the contributions. The federal cause of action rested upon ERISA §§ 502 (a)(2) & (3), 29 U.S.C. §§ 1132(a)(2) & (3), and the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185. ERISA § 502(a)(2) provides for a civil action by a fiduciary "for appropriate relief under Section 409" which concerns remedies for breach of fiduciary duty. ERISA § 502(a)(3) provides a civil action by a fiduciary to enjoin violations of ERISA or ERISA plans, and for other appropriate equitable relief to redress such violations or to enforce provisions of ERISA or the plan. LMRA § 301 provides for "[s]uits for violations of contracts between an employer and a labor organization." 29 U.S.C. § 185(a). The Trust Funds also included a pendant state law claim against Mark Diversified under California Civil Code § 1559, which allows a third party beneficiary to

enforce a contract made expressly for its benefit. The district court dismissed the state law claims, based upon complete federal preemption under ERISA § 514(a), 29 U.S.C. § 1144(a). App. B at 42a.

The federal ERISA cause of action against Mark Diversified was dismissed, on the ground that Mark Diversified, though having agreed to pay the direct employer's contributions, did not fall within the ERISA definition of "employer" as "a person acting directly as an employer or indirectly in the interest of an employer in relation to an employee benefit plan," 29 U.S.C. § 1002. App. B at 38a. The court also dismissed the claim that the failure to pay promised contributions could involve a breach of the ERISA fiduciary duties. *Id.* The Trust Funds' request for leave to amend their federal cause of action was denied. *Id.* at 42a.

The Court of Appeals affirmed dismissal of the state law claims on grounds of ERISA preemption, declining to consider whether preemption gave the district court federal subject matter jurisdiction for removal or dismissal. App. A at 5a-6a. As to the federal claim against Mark Diversified, the Ninth Circuit affirmed that neither ERISA nor LMRA permitted an action for contributions against the contractor. Despite its written agreement to pay on behalf of its subcontractor, Mark Diversified could not be an ERISA "employer" or fiduciary, the court of appeals said. App. A at 10a-19a.

The Trust Funds petitioned for rehearing with suggestion for rehearing *en banc*, on grounds generally stated in the dissenting opinion, App. A at 21a-26a, indicating apparent conflict with decisions of other Circuits, which have construed the ERISA definition of "employer" broadly and have applied ERISA § 515 to require payment of collection of contributions based on agreements other than collective bargaining agreements. The Trust Funds also indicated that the opinion overlooks the plain language and legislative history of the ERISA definition

of "employer" and that it overlooks the purpose of ERISA § 515, to facilitate and simplify collection of contributions in order to safeguard benefits. *See Laborers Health and Welfare Trust Fund for Northern California v. Advanced Lightweight Concrete Co., Inc.*, 484 U.S. 539, 546-47 & nn. 12-14 (1988).

REASONS FOR GRANTING THE WRIT

This case concerns the permitted reach of actions by ERISA plan fiduciaries to collect promised contributions from persons who, though not themselves signatory to a collective bargaining agreement, are obligated by their own written agreement to make contributions or are subject to a state law remedy applying to a construction lender. The Ninth Circuit has narrowly construed the ERISA provisions defining "fiduciary," "employer" and "employer obligated to make contributions," 29 U.S.C. §§ 1002(5), 1002(21) & 1145, in a manner that seriously limits the ability of multiemployer plan fiduciaries to collect promised contributions under federal law, while broadening the scope of ERISA preemption to prevent use of State law remedies. This construction conflicts with the Congressional purpose in enacting ERISA § 515, 29 U.S.C. § 1145, to facilitate collection of contributions in order to assure funding and to safeguard benefits, *Advanced Lightweight*, *supra*, 484 U.S. at 546-47. The Opinion below also conflicts with the limits on ERISA preemption recognized in *Mackey v. Lanier Collection Agency*, 486 U.S. 825, 834 (1988) (generally applicable state garnishment law not preempted), and *Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 27-28 1983) (under well-pleaded complaint rule, no federal original or removal jurisdiction over complaint to enforce state tax levies against ERISA plans).

The Ninth Circuit's interpretation of the ERISA § 3(5) definition of "employer" directly conflicts with published opinions in the First Circuit which would not have affirmed dismissal of the federal cause of action with

prejudice. The Ninth Circuit's reading of ERISA § 515 directly conflicts with decisions of the Second, Sixth, Seventh and District Court Circuits, all of which would permit the case against the contractor Mark Diversified to go to trial in federal court on its written agreement to pay contributions on its subcontractor's behalf. Essential actions by ERISA fiduciaries to collect contributions are now sharply restricted in the Ninth Circuit, threatening the funding of multiemployer plans, and placing benefits at risk.[1]

The questions presented for review have profound significance to multiemployer employee benefit plans and the millions of employees and beneficiaries who depend upon these plans for pension, health, and other benefits. An employer with a collective bargaining agreement requiring contributions may often reach an agreement under which promised contributions will be paid by someone else. Such an arrangement, by enabling the employer to provide assurances to construction developers, the union, the employees, and others that promised contributions will

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[1] The Trust Funds respectfully urge the Court to invite the Department of Labor to file a brief to aid the Court in consideration of this petition. This decision will have an impact on the Department of Labor, which is charged with numerous enforcement and regulatory tasks respecting ERISA provisions designed to assure plan funding, payment of contributions, and the guarantee of promised benefits. *See, e.g.*, ERISA §§ 502 & 505, 29 U.S.C. §§ 1132 & 1135. The Secretary of Labor has recently expressed an interest in test cases concerning the scope of ERISA preemption and with ensuring benefit levels. *See* 21 BNA Pension & Benefits Reporter, 1689 (Sept. 12, 1994).

Since withdrawal liability assessments under ERISA Title IV turn upon defining an "employer that has an obligation to contribute under a plan for work performed in the building and construction industry," 29 U.S.C. § 1383(b)(1), the definition of "employer" used in Title I will affect collection of withdrawal liability as well as of contributions under 29 U.S.C. § 1145. The Secretary of Labor, as chairman of the board of directors of the Pension Benefit Guaranty Corporation, 29 U.S.C. § 4002(d), has statutory duties in that area as well.

be made, allows the work to go forward and the employee benefit plans to receive their funding. But when contributions cease, the employees face possible loss of benefits, and the financial integrity of the plans can suffer severely.

The Court should now address the effect of the ERISA preemption doctrine on actions for contributions, in which benefits are not involved. Cases continue to proliferate in the lower courts, expanding ever more broadly the sweep of ERISA preemption of State laws that "relate to" an employee benefit plan. ERISA preemption here even provided federal removal jurisdiction, which should be limited to beneficiary suits, where concurrent Federal and State jurisdiction exists, as in *Metropolitan Life Insurance Co. v. Taylor*, 481 U.S. 58, 63 (1987). This Court has not addressed the effects of ERISA preemption doctrine on collection of contributions using purely state law remedies, such as the construction stop notice involved here. The decision below erroneously interprets ERISA provisions affecting all multiemployer employee benefit plans. Those plans' well-being is an important national concern, and it requires effective means of collecting all promised contributions.

I. THE COURT OF APPEALS' DECISION CONFLICTS DIRECTLY WITH OTHER CIRCUITS' INTERPRETATION OF THE ERISA SECTION 3(5) DEFINITION OF "EMPLOYER" AND THE SECTION 515 OBLIGATION TO MAKE CONTRIBUTIONS.

Decisions by courts of appeals applying ERISA § 515 indicate that a decision in this case by the First, Second, Sixth, Seventh, or District of Columbia Circuits would have led to the opposite result. The contractor who agreed to make its subcontractor's contributions would be subject to suit under ERISA § 515, as an "employer . . . obligated to make contributions to a multiemployer plan," 29 U.S.C. § 1145. In all of those Circuits, the statutory language of both the ERISA definition of "employer," ERISA § 3(5), 29 U.S.C. § 1002(5), and the contribu-

tion duty imposed by ERISA § 515, are given the literal meaning of their plain language. The Ninth Circuit's method of analysis led to its departure from the statute's plain language, as the dissenting opinion below points out.[2]

A. The method used by the First Circuit to analyze a claim for contributions under ERISA § 515 should be followed. In *Massachusetts Laborers' Health and Welfare Fund v. Starrett Paving Corp.*, 845 F.2d 23, 24 (1st Cir. 1988) (Breyer, J.), the question was whether a corporation's chief officer and shareholder could be held personally liable for the corporation's promise of contributions solely because of his position. To answer the question, the court "must decide if he is (1) an 'employer,' (2) who is obligated to make contributions to a multiemployer plan." *Id.* at 24. The court analyzed first the ERISA definition, noting that the term "employer" should probably be given the "broader-than-common-law" interpretation of the "employer" definition under the Fair Labor Standards Act. Next, the court examined ERISA § 515 and concluded that the corporate officer in that case was not an "employer . . . obligated to make contributions." Then-Judge Breyer's opinion rested upon "the express words of the statute," *Starrett Paving, supra*, 845 F.2d at 25.

Had the Ninth Circuit taken the analytical approach used by the First Circuit in *Starrett Paving*, as recommended in the dissenting opinion below, it would have reach an opposite result in the present case. First, the Court would have held that, taking the pleadings as true under Rule 12(b)(6), Fed. R. Civ. P., contractor Mark

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[2] "The first mistake that the majority makes is to collapse the ERISA definition of employer with its analysis of who is obligated to pay into a multiemployer plan under Section 515. These discussions should proceed separately in order to give each section its intended meaning. *See, e.g., Massachusetts Laborers' Health and Welfare Fund v. Starrett Paving Corp.*, 845 F.2d 23, 24-26 (1st Cir. 1988)." Appendix A at 21a.

Diversified was an ERISA "employer," because, in agreeing to pay contributions on behalf of his subcontractor (the direct employer) it acted "in the interest of an employer," 29 U.S.C. § 1002(5). The Court would then have found that by making a written contract to pay the contributions, Mark was also an "employer . . . obligated to make contributions to a multiemployer plan," 29 U.S.C. § 1145.

Instead of following the First Circuit's approach, the Ninth Circuit, relying on two of its prior cases, inappositely likened the case to that of a surety on a statutory contractors license bond, *Carpenters Southern California Administrative Corp. v. D. & L. Camp Const. Co., Inc.*, 738 F.2d 999 (9th Cir. 1984), or to a non-signatory property owner, subject to a statutory mechanics lien, *Carpenters Southern California Administrative Corp. v. Majestic Housing*, 743 F.2d 1341 (9th Cir. 1984). The surety was held to be not an ERISA "employer" because it was not acting for the benefit of the employer, but was "guaranteeing protection . . . [to] a broad class of entities that deal with contractors." *D. & L Camp*, 738 F.2d at 1001. *But cf. Greenblatt v. Delta Plumbing & Heating Corp.*, 818 F. Supp. 623, 625-26 (S.D.N.Y. 1993) (surety on bond may fit ERISA "employer" definition). By contrast, Respondent Mark Diversified "expressly assumed the employer's obligations to pay labor benefits," as the dissenting opinion below points out. App. A at 23a. Mark Diversified's written contract to contribute distinguishes it from the property owner in *Majestic Housing*, which had no contractual obligation at all to pay any contributions. Both the plain language and legislative history of the ERISA employer definition, as outlined in the opinion of then-Judge Breyer in *Starrett Paving*, dictate the conclusion that Mark is an ERISA employer. *See Kwatcher v. Massachusetts Service Employees Pension Funds*, 879 F.2d 957, 960 (1st Cir. 1989) (ERISA expands common-law definition of "employer"). *But see Madonia v. Blue Cross & Blue Shield of Virginia*, 11 F.3d 444, 448 (4th Cir. 1993) (common law principles apply to ERISA "employer" definition).

The Ninth Circuit's approach will seriously weaken the ability of employee benefit plan fiduciaries to collect promised benefits from entities that act either directly or "indirectly in the interest of an employer in relation to an employee benefit plan," 29 U.S.C. § 1002(5). The ERISA definition of "employer" has now been limited, in the Ninth Circuit, to direct employers, contrary to the statutory language, which includes those acting indirectly on their behalf, *id.*

B. Section 515 has suffered a similar gutting, with perhaps even more serious effects upon employee benefit plans. The Ninth Circuit's holding that an agreement in a subcontract to pay contributions, "asserts a state right of action, not a right under ERISA § 515," App. A at 14a, directly conflicts with the statute's plain language, as well as with its interpretation by other Circuits, with the sole exception of the Eleventh Circuit, which has reserved the status of ERISA employer for direct signatories to a collective bargaining or trust agreements. *Xaros v. U.S. Fidelity & Guaranty Co.*, 820 F.2d 1176, 1180 (11th Cir. 1988). Other Circuits have recognized that the essential requirement of Section 515 is that there be any written agreement to make the contributions—the statute's use of the word "obligated" indicates only a contract, not necessarily a collective bargaining agreement.

Thus, the Sixth Circuit enforced an agreement to pay contributions that was not a collective bargaining agreement. *Central States, Southeast and Southwest Areas Pension Fund v. Behnke, Inc.*, 883 F.2d 454, 459 (6th Cir. 1989). The statutory duty imposed by § 515 "is not dependent on the existence of a collective bargaining agreement," and an agreement to make the contributions is sufficient. *Id.* The Seventh Circuit has likewise made it clear, after *en banc* consideration, that an agreement to pay contributions need not be a collective bargaining agreement. *Central States, Southeast and Southwest Areas Pension Fund v. Gerber Truck Service, Inc.*, 870 F.2d 1148, 1151 (7th Cir. 1989). The view of the Seventh

Circuit is fully consistent with the analysis of the First Circuit in *Starrett Paving, supra*, 845 F.2d at 25, which relies upon the express words of the statute, bolstered by the legislative history of ERISA § 515. The District of Columbia Circuit has likewise read § 515 "straightforwardly," as "creating a federal right of action independent of the contract on which the duty to contribute is based." *Bituminous Coal Operators' Ass'n., Inc. v. Connors*, 867 F.2d 625, 633 (D.C. Cir. 1989). There too, § 515 would create a right of action against a contractor such as Mark that had agreed in writing to pay its subcontractor's contributions. *See id.*

The courts of appeal for the First, Second, Sixth, Seventh and District of Columbia Circuits have all construed § 515 in a manner in keeping with the intent of Congress to simplify and facilitate actions to collect contributions, in order to guarantee the well-being of multiemployer employee benefit plans, and to safeguard benefits. This legislative history, referred to in *Advanced Lightweight, supra*, 484 U.S. at 546-48, was ignored in the Ninth Circuit's opinion below. As a result of the split among the Circuits respecting application of § 515, multiemployer plan fiduciaries in the twelve states comprising the Ninth and Eleventh Circuits may not collect contributions from contractors who have obligated themselves to do so on behalf of an employer who is signatory to a collective bargaining agreement. Depriving these multiemployer plans from use of § 515 to bring such actions in federal courts to collect contributions seriously harms the abilities of such plans to continue to provide benefits, an important Congressional purpose.

The lack of uniformity among the Circuits also harms the jurisdictional expectations of Congress, in that uniform application nationally of federal law respecting employee benefits is one of the foundations for enactment of all ERISA provisions. Indeed the broad language of the ERISA supersedure clause upon which the doctrine of ERISA preemption is based, 29 U.S.C. § 1144(a), was

justified on the basis of extreme importance of uniformity of the federal law of employee benefits. That uniformity is now seriously ruptured with respect to a key ERISA provision enacted to safeguard benefits under multi-employer plans. This Court should now act to resolve this split of authority, before more serious harm results.

II. THE DECISION OF THE COURT OF APPEALS IGNORES THE LEGISLATIVE HISTORY OF ERISA SECTION 515 AND DEPRIVES MULTIEMPLOYER PLANS OF REMEDIES NECESSARY TO SECURE PROMISED CONTRIBUTIONS IN ORDER TO SAFEGUARD BENEFITS.

The decision below presents a specific, direct conflict with the undoubted purpose of § 515, as expressed in its legislative history. This Court reviewed that legislative history in detail in *Advanced Lightweight Concrete Co., supra,* 484 U.S. at 546-48. As pointed out by then-Judge Breyer:

> The court read § 1145's legislative history as showing that the statute's purpose was "to give employers" a strong incentive to honor their *contractual* obligations to contribute and to facilitate the collection of delinquent accounts." *Advanced Lightweight Concrete,* 108 S.Ct. at 835 (emphasis added). See also *id.* at 836, n. 16, interpreting word "obligated" of § 1145 to exclude employer's *statutory* obligations).

Massachusetts Laborers' Health and Welfare Fund v. Starrett Paving Corp., 845 F.2d 23, 25 (1st Cir. 1988). The individual corporate owner in *Starrett Paving* was not subject to suit as one "obligated" to make contributions under 29 U.S.C. § 1145, because that section is directed towards those with an existing contractual obligations to make contributions. Unlike the individual corporate owner, Respondent Mark Diversified had such a contractual obligation and the ERISA action to enforce it should not have been dismissed.

Section 515 was added to ERISA in 1980 as part of the Multiemployer Pension Plans Act of 1980, Pub.L.No. 96-364, 94 STAT 1208 ("MPPAA"), in order to assist multiemployer plans in recovering delinquent contributions. The Senate Committee on Labor stated that "[t]he bill imposes a Federal statutory duty to contribute on employers that are already contractually obligated to make contributions to multiemployer plans." Staff of Senate Committee on Labor and Human Resources, 96th Cong., 2d Sess., *The Multiemployer Pension Plan Amendments Act of 1980: Summary and Analysis of Consideration* (44 Committee Print 1980). Congress added § 515 "to give employers a strong incentive to honor their contractual obligations to contribute and to facilitate the collection of delinquent accounts." *Advanced Lightweight Concrete Co., supra,* 484 U.S. at 547, citing Committee Print, *supra.* The Ninth Circuit ignored all such legislative history of § 515, as well as the discussions of it by this Court and various courts of appeals.

The greater harm of the Ninth Circuit's departure from the Congressional purpose in construing § 515 will likely be the departure from the larger reasons for its enactment—ensuring the continued viability of multi-employer benefit plans and the benefits provided by those plans. The decision below is heedless of that larger purpose, as expressed in authoritative legislative statements.

> Delinquencies of employers in making required contributions are a serious problem for most mutli-employer plans. Failure of employers to make promised contributions in a timely fashion poses a variety of costs on plans. While contributions remain unpaid, the plan loses the benefit of investment income that could have been earned if the past due amounts had been received and invested on time. Moreover, additional administrative costs are incurred in detecting and collecting delinquencies. Attorneys fees and other legal costs arise in connection with collection efforts.

> These costs detract from the ability of plans to formulate or meet funding standards and adversely affect the financial health of plans. Participants and beneficiaries of plans, as well as employers who honor their obligation to contribute in a timely fashion, bear the heavy cost of delinquencies in the form of lower benefits and higher contribution rates. Moreover, in the context of this legislation, uncollected delinquencies can add to the unfunded liability of the plan and thereby increase the potential withdrawal liability for all employers.
>
> Recourse available under current law for collecting delinquent contributions is insufficient and unnecessarily cumbersome and costly. Some simple collection actions brought by plan trustees have been converted into lengthy, costly and complex litigation concerning claims and defenses unrelated to the employer's promise and the plan's entitlement to the contributions. This should not be the case. Federal pension law must permit trustees of plans to recover delinquent contributions efficaciously. Sound national pension policy demands that employers who enter into agreements providing for pension contributions not be permitted to repudiate their promises.

Committee Print, supra. This explanation of the overall purpose of § 515 is authoritative, according to the legislation's sponsors. *See Central States Southeast and Southwest Areas Pension Fund v. Central Transport, Inc.*, 472 U.S. 559, 580 & n. 22 (1985).

The Ninth Circuit in the decision below permits exactly what § 515 was enacted to prevent. ERISA-defined employers with agreements to pay pension contributions have now been given leave "to repudiate their pension promises," *Committee Print, supra,* so long as that promise is expressed in a document other than an unexpired collective bargaining agreement or trust agreement. The decision below "will make it all too easy for employers to contract away their duty to make payments, leaving

the pension funds with no recourse under either state or federal law," as the dissenting opinion below points out, App. A at 26a.

This departure from legislative history is thus far from an academic matter, nor is it limited to narrow circumstances. The funding of multiemployer plans and their ability to provide benefits are exposed to a variety of new risks as a result of the decision below. The Ninth Circuit has spun the following unwieldy syllogism: The Trust Funds are third party beneficiaries to Respondent Mark Diversified's written agreement to make its subcontractor's contributions. App. A at 13a. Such a third party beneficiary claim cannot be brought under ERISA § 515, because the claim enforces state law obligations. App. A at 13a-14a. The obligation cannot be enforced under California law, because ERISA preempts even a law of general applicability making no reference to an employee benefit plan, to the extent that it is used to collect contributions. *Id.* at 10a. Therefore, the written agreement to make contributions cannot be enforced.

To reach this result, the Court of Appeals also had to dispose of the Trust Funds' allegations that Mark Diversified assumed a fiduciary duty respecting the contributions it had agreed to make. *See, Northern California Retail Clerks Union v. Jumbo Markets, Inc.*, 906 F.2d 1371, 1373 (9th Cir. 1990). This was achieved by affirming dismissal under Rule 12(b)(6) without permitting any amendment of the federal claim contrary to the policy favoring liberal amendment. The court of appeals narrowly construed the ERISA "fiduciary" definition, despite this Court's recent teaching to the contrary:

> To help fulfill ERISA's broadly protective purposes, Congress commodiously imposed fiduciary standards on persons whose actions affect the amount of benefits retirement participants will receive.

John Hancock Mutual Life Ins. v. Harris Trust & Savings Bank, 510 U.S. ——, ——, 114 S.Ct. 517, ——, 126

L.Ed. 524, 537 (1993) (footnote omitted). Accordingly, one who, like Mark Diversified, has assumed an obligation to pay contributions to an ERISA trust is subject to fiduciary standards. The Ninth Circuit's narrow construction of ERISA provisions (except for ERISA preemption) discards the Congressional purpose of enacting § 515, and turns the statute on its head.

III. THE DOCTRINE OF ERISA PREEMPTION IS NOT UNLIMITED, AND IT CANNOT PROVIDE FEDERAL JURISDICTION FOR REMOVAL OR DISMISSAL, EXCEPT AS TO ACTIONS REDRESSABLE UNDER ERISA § 502(a).

The ERISA preemption doctrine has been distorted in the Ninth Circuit, thereby harming the Congressional purpose in enacting ERISA § 515, as well as other provisions. The decision below has now approved use of the ERISA supersedure clause to provide federal question jurisdiction for removal, followed by dismissal of an action for contributions. This is an unwarranted extension of *Metropolitan Life Ins. v. Taylor,* 481 U.S. 58 (1987), where this Court recognized that the doctrine of ERISA "complete preemption" could be used to establish federal question jurisdiction in the narrow case of beneficiaries' claims that are redressable under ERISA § 502(a)(1)(B). This exception is significant because such suits are accorded concurrent state and federal jurisdiction. No such concurrent jurisdictional scheme exists in ERISA for collection of contributions. And no ERISA cause of action exists against a lender, like Respondent TRI-Capital, which holds sums due on a construction project.

The holding below that ERISA preempts a California stop notice remedy against a construction lender violates the long-established limits upon jurisdiction of federal district courts to hear "only those cases in which a well-pleaded complaint establishes either that federal law creates the cause of action or that the Plaintiff's right to relief necessarily depends on resolution of a substantial

question of federal law." *Franchise Tax Board v. Construction Laborers Vacation Trust,* 463 U.S. 1, 27-28 (1983). Considering the application of the doctrine of "complete" federal preemption in a suit by state taxing authorities to enforce levies against ERISA plans, the Court held that claims not included in any ERISA cause of action were not within the original or removal jurisdiction of the federal courts, *id.* at 24-25, following *Avco Corp. v. Aero Lodge No. 735, Int'l Assn. of Machinists,* 390 U.S. 557 (1968). The State law complaint against lender TRI-Capital presented a claim not allowed for by the broadest reading of ERISA preemption, the rule of *Avco.* As explained by Justice Brennan, for a unanimous court, "*Avco* stands for the proposition that if a federal cause of action completely preempts a state cause of action, any complaint that comes within the scope of the federal cause of action necessarily 'arises under' federal law." *Franchise Tax Board, supra,* 463 U.S. at 23-24. The Ninth Circuit has extended federal preemption far beyond the standard of *Franchise Tax Board.* There being no ERISA cause of action to collect contributions from a construction lender, the doctrine of ERISA preemption was wrongly applied.

The Ninth Circuit's opinion below also extends "preemption removal" into the collections area, where it does not belong. Since ERISA does provide for beneficiary actions concerning benefits, preemption is complete in that field, providing original and removal federal jurisdiction over a complaint purporting to raise only State law claims. *Metropolitan Life Ins. Co. v. Taylor,* 481 U.S. 58, 66-67 (1987). The Court's holding, limited to beneficiaries' suits for which ERISA § 502(a)(1)(B) provides federal and state concurrent jurisdiction, could not be applied to an action for contributions even if ERISA provided a cause of action against a lender for contributions. It is not an accident that the *only* actions ERISA provided for that can be brought in State court are suits by participants or beneficiaries, ERISA § 502(e)(1), 29 U.S.C.

§ 1132(e)(1). Legislative history respecting actions for benefits provided that " '[*a*]*ll such actions in Federal or State courts are to be regarded as arising under the laws of the United States in similar fashion to those brought under Section 301 of the Labor-Management Relations Act of 1947*," and "consistently sets out this clear intention." *Metropolitan Life, supra,* 481 U.S. at 65-66, *quoting* H.R. Conf. Rep. No. 93-1280, p. 327 (1974) (emphasis added by Court). Since actions against a construction lender are not provided for in either the statutory language or the legislative history of ERISA, there can be no application of the *Avco* rule to the stop notice remedy against TRI-Capital. *See Alexander v. Electronic Data Systems,* 13 F.3d 940, 945 (6th Cir. 1994) (where there is no ERISA cause of action, preemption does not create jurisdiction).

The Ninth Circuit declined to address the issue of federal jurisdiction based on ERISA preemption, because of the Trust Funds' decision to add an ERISA claim against the contractor rather than appealing separately the issue of jurisdiction over the stop notice action against the lender. According to the court of appeals, the district court "at a minimum could have asserted jurisdiction over the stop notice cause of action as a pendant state claim," App. A at 5a.[3] This approach to preemption cannot be squared with the *Avco* rule, of "complete" federal preemption, because the State law complaint to enforce a stop notice does not come within the scope of an ERISA cause of action. *See Franchise Tax Board, supra,* 463 U.S. at 23-24. Thus, there could be no jurisdiction, originally or upon removal, over the cause of action against the lender, TRI-Capital, at any time, as the Ninth Circuit's

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[3] The court of appeals failed to note that there was no trial and no final judgment on the merits prior to the judgment appealed from, unlike the case cited, *Federated Department Stores, Inc. v. Moitie,* 452 U.S. 394, 399 n. 3 (1981), where dismissal under Rule 12(b)(6), Fed.R.Civ.P., was a final judgment on the merits.

own prior cases indicate. *Carpenters Southern California Admin. Corp. v. Majestic Housing*, 743 F.2d 1341 (9th Cir. 1984) (no federal jurisdiction over suit against property owner to enforce state law mechanics lien); *Carpenters S. Cal. Admin. Corp. v. D & L Camp Constr. Co.*, 738 F.2d 999 (9th Cir. 1984) (no federal jurisdiction over action on state law contractors license bond).

The manner in which the ERISA preemption doctrine has grown beyond the limits of the statute's causes of action, or even the *Avco* "complete preemption" doctrine, is shown by the Ninth Circuit case relied upon below for ERISA preemption of any collection action. *Trustees of Electric Workers Health and Welfare Trust v. Marjo Corp.*, 988 F.2d 865 (9th Cir. 1992). *See* App. A, at 7a. After *Marjo*, it is irrelevant to determine whether ERISA provides a cause of action for collections, under the *Avco* doctrine, as required by *Metropolitan Life v. Taylor, supra*, 481 U.S. at 65-66, because State laws are said to "relate to" employee benefit plans if they are used by them to collect contributions. *Marjo Corp., supra*, 988 F.2d at 867. Such an approach flouts this Court's consistent jurisdictional interpretations to the effect that

> Congress has given the lower federal courts jurisdiction to hear, originally or by removal from a state court, only those cases in which a well-pleaded complaint establishes either that federal law creates the cause of action or that the Plaintiff's right to relief necessarily depends on resolution of a substantial question of federal law.

Franchise Tax Board, supra, 463 U.S. at 27-28.

The scope of ERISA preemption has limits and does not cover generally applicable state laws that provide for claims not within any ERISA cause of action. *Mackey v. Lanier Collections Agency*, 486 U.S. 825 (1988) (state law generally applicable garnishment statute not preempted by ERISA). For this reason, ERISA fails to preempt *either* the California stop notice remedy against a con-

struction lender *or* the State law cause of action against the general contractor, Mark Diversified. The court of appeals below affirmed dismissal under Rule 12(b)(6), Fed.R.Civ.P., of the ERISA cause of action against Mark Diversified on grounds that ERISA § 515 could not be applied. That being the case, generally applicable State law remains unpreempted, as in *Mackey*.

The generally applicable State law invoked against the contractor, California Civil Code § 1559, provides for actions by third party beneficiaries to a contract. The Trust Funds assert that this action to enforce Mark Diversified's written agreement to pay contributions arises under ERISA. However, if the Ninth Circuit were correct in holding to the contrary, that very holding of no ERISA jurisdiction would prevent ERISA preemption of the State law contract claim. The Trust Funds do not merely complain that no remedy is available to them under the decision below, but that they are prevented from performing their duties as ERISA plan fiduciaries charged with collecting promised contributions. The ERISA preemption doctrine was not developed in order to prevent an action for enforcement of a contract to pay contributions from moving past the initial pleading. There is no reason for the ERISA preemption provision, 29 U.S.C. § 1144(a), to be construed more broadly than any other provision of ERISA itself.

The unjustified expansion of the sweep of ERISA preemption leads to many anomalies that disturb not only the federal jurisdiction scheme, but also the remedial purposes of ERISA in safeguarding employee benefit plans and facilitating of contributions to that end. The decisions below construe broadly the ERISA supersedure clause, 29 U.S.C. § 1144(a), to effect removal and dismissal of state law remedy used to collect contributions from a lender. Yet ERISA provisions for collecting contributions are construed so narrowly that a suit to collect from a contractor with a written agreement to pay them is dis-

missed. The Court should now address the scope of ERISA preemption in the context of actions by plan fiduciaries to collect contributions. The Court should reaffirm its approach to jurisdiction in *Franchise Tax Board, supra*, 463 U.S. 1, because the doctrine of federal preemption threatens to swallow up the remedial purposes of the federal statute. It is only to give effect to those purposes that ERISA provisions are to be broadly construed.

The preemption analysis of the court of appeals below severely strains the remedial purposes of the ERISA § 515, 29 U.S.C. § 1145 collection right of action. To reduce the tension produced by an overbroad application of ERISA preemption, either the preemption doctrine must be restrained within the limits of consistent federal jurisdictional interpretation, or the ERISA collection provisions must be given a reasonably broad reading so that the ERISA purpose of providing for collection of contributions may be protected. Otherwise, the contribution duty may be avoided all too easily, and the plans and benefits themselves placed at risk, contrary to the intentions of Congress.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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October 6, 1994

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 92-15112

D.C. No. CV-90-00239-MLS

OPINION

CARPENTERS HEALTH AND WELFARE TRUST FUND FOR CALIFORNIA; CARPENTERS PENSION TRUST FUND FOR NORTHERN CALIFORNIA; CARPENTERS VACATION AND HOLIDAY TRUST FUND FOR NORTHERN CALIFORNIA; CARPENTERS APPRENTICESHIP AND TRAINING TRUST FUND FOR NORTHERN CALIFORNIA; CARPENTERS ANNUITY TRUST FUND FOR NORTHERN CALIFORNIA,
Plaintiffs-Appellants,

v.

TRI CAPITAL CORP., MARK DIVERSIFIED,
Defendants-Appellees.

Appeal from the United States District Court
for the Eastern District of California
Milton L. Schwartz, District Judge, Presiding

Argued and Submitted
April 16, 1993—San Francisco, California

Filed June 3, 1994

Before: Warren J. Ferguson, William C. Canby, Jr., and Melvin Brunetti, Circuit Judges.

Opinion by Judge Brunetti; Dissent by Judge Ferguson

OPINION

BRUNETTI, Circuit Judge:

Appellants, ERISA benefit plans for members of the carpenters' union, are owed money by a subcontractor for work performed on a building improvement project. They brought suit in state court against the construction lender for the project to recover the money under California's "bonded stop notice" remedy. The construction lender and the general contractor on the project, both of which are appellees, removed to federal court and moved to dismiss for failure to state a claim. After the motion was granted, appellants filed a first amended complaint alleging additional federal and state law claims. Appellees again moved to dismiss for failure to state a claim, and the district court again granted the motion. Appellants appeal the dismissal, and we affirm.

1. Facts and Proceedings Below

Appellants (hereafter referred to as the "Trust Funds") are five multiemployer employee benefit plans under the Employee Retirement Income Security Act of 1974 ("ERISA"), as defined in 29 U.S.C. § 1002(37). In May 1972, Rodney Stark, doing business as Stark Construction, entered into a collective bargaining agreement with the United Brotherhood of Carpenters and Joiners of America. The agreement provided that Stark would pay to the Trust Funds fringe benefit contribution at specified rates for each hour of covered carpentry work used by him. In July and August 1989, Stark employed carpenters to perform improvements on a private property

in Stockton, California known as O'Connor Woods. Stark had been engaged by Mark Diversified, Inc. ("Mark"), the general contractor on the project. The carpenters expended 8,416 hours of covered carpentry work, generating $66,107.68 in fringe benefit contributions. However, Stark failed to pay this amount.

The Trust Funds wanted their money. Stark, however, had filed for Chapter 7 bankruptcy protection. Therefore, the Trust Funds went after Mark and Tri Capital Corporation ("Tri Capital"), the construction lender on the project. The Trust Funds first served a "bonded stop notice" on Tri Capital, pursuant to Cal. Civ. Code § 3159. Under California law, upon receipt of such notice Tri Capital was obliged to withhold from the sums due to Stark enough money to satisfy the Trust Funds' claims. Cal. Civ. Code § 3162 (West Supp. 1993). Tri Capital refused to comply.

The Trust Funds then brought an action in California state court against Tri Capital and Doe Defendants 1-80 to enforce the stop notice, pursuant to Cal. Civ. Code § 3172. Tri Capital and Mark, which had concluded that it must be one of the Doe Defendants, removed the action to the federal district court. Tri Capital and Mark argued that the California stop notice remedy was preempted by ERISA and by the National Labor Relations Act. The Trust Funds moved to remand to state court and defendants moved to dismiss on the ground of ERISA preemption. On April 19, 1991, the district court denied the Trust Funds' motion and granted appellees' motion to dismiss, with 30 days to amend.

The Trust Funds then filed an amended complaint on May 17, 1991. Their first claim, enforcement of the stop notice under California law, is identical to the cause of action pleaded in the original complaint. Their second and third claims allege that they are third-party beneficiaries to an agreement between Mark and Stark whereby Mark agreed to pay the fringe benefits by "joint check."

The second claim is based on remedies for breach of fiduciary duty provided by ERISA and by the Labor Management Relations Act ("LMRA"); the third claim is based on a California state law providing for actions by a third-party beneficiary to enforce a contract made explicitly for its benefit. All three claims seek recovery of the same $66,107.68 that Stark allegedly failed to pay to the Trust Funds.

Appellees again filed a Fed. R. Civ. P. 12(b)(6) motion to dismiss the amended complaint for failure to state a claim. On January 6, 1992, the district court entered a final order granting their motion and dismissing the complaint without leave to amend. The Trust Funds appeal from this judgment and also appeal the district court's assertion of federal jurisdiction upon removal of the original complaint. Both parties seek attorneys' fees on appeal.

II. Standard of Review

We review de novo a district court's Fed. R. Civ. P. 12(b)(6) dismissal for failure to state a claim. *Kruso v. International Tel. & Tel. Corp.*, 872 F.2d 1416, 1421 (9th Cir. 1989), *cert. denied*, 496 U.S. 937 (1990). A complaint should not be dismissed "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Love v. United States*, 915 F.2d 1242, 1245 (9th Cir. 1989) (quotation omitted).

III. State Law Stop Notice Claim

A. *Federal subject matter jurisdiction.*

On appeal, the Trust Funds renew their contention that the district court erred in denying their motion to remand. "Where a motion to remand is denied, the propriety of removal is reviewable [(i)] on appeal from the final judgment or [(ii)] by interlocutory appeal if the refusal to remand is certified." *Sheeran v. General Elec. Co.*, 593 F.2d 93, 97 (9th Cir.), *cert. denied*, 444 U.S.

868 (1979). However, the Trust Funds took neither of these courses of action; instead, they amended their complaint to include claims based on federal law and refiled in federal district court.

We have held that:

> when there is no appeal of a denial of a remand motion and the case is tried on the merits, the issue on appeal is whether the federal court would have had jurisdiction had the case been filed in federal court in the posture it had at the time of the entry of the final judgment.

Lewis v. Time, Inc., 710 F.2d 549, 552 (9th Cir. 1983). Because a Rule 12(b)(6) dismissal is a judgment on the merits, *Federated Dept. Stores, Inc. v. Moitie*, 452 U.S. 394, 399 n.3 (1981), we must determine whether the district court would have jurisdiction given the posture of the case at the time the judgment was entered. At that time, the Trust Funds' second cause of action alleged breach of the collective bargaining agreement and sought redress under ERISA § 502(a)(2). Federal district courts have exclusive jurisdiction over such actions. 29 U.S.C. § 1132(e)(1) (1988); *Pension Trust Fund v. Triple A Mach. Shop, Inc.*, 942 F.2d 1457, 1461 (9th Cir. 1991). Therefore, the district court at a minimum could have asserted jurisdiction over the stop notice cause of action as a pendent state claim, because the two claims "derive from a common nucleus of operative fact." *United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966); *see* 28 U.S.C. § 1367(a) (Supp. IV 1991) (supplemental jurisdiction). We hold that the district court had jurisdiction over the Trust Funds' first amended complaint.

B. *ERISA preemption.*

The district court held that the Trust Funds' state law stop notice claim "relate[d] to" an employee benefit plan and that therefore ERISA completely preempted the

claim. The district court dismissed the claim on Rule 12(b)(6) grounds in both the original complaint and the first amended complaint.

We agree with the district court that the California stop notice remedy is preempted by ERISA. ERISA's preemption clause provides that

> Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter *relate to* any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title.

29 U.S.C. § 1144(a) (1988) (emphasis added).[1] The Supreme Court has recognized that ERISA preemption is "conspicuous for its breadth" and that its "deliberately expansive language was designed to establish pension plan regulation as exclusively a federal concern." *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133, 138 (1990) (quotations omitted). "ERISA § 514(a) pre-empts 'any and all State laws insofar as they may now or hereafter *relate to* any employee benefit plan' covered by the statute." *Mackey v. Lanier Collection Agency & Serv., Inc.*, 486 U.S. 825, 829 (1988) (quoting 29 U.S.C. § 1144(a)) (emphasis added).

Although we have never decided the precise question of whether the California stop notice remedy is preempted by ERISA,[2] we have read the ERISA preemption clause

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[1] The Trust Funds are covered by ERISA because they are "established or maintained . . . by [an] employee organization . . . representing employees engaged in commerce or in any industry or activity affecting commerce." 29 U.S.C. § 1003(a) (1988).

[2] In *Sturgis v. Herman Miller*, 913 F.2d 1127 (9th Cir. 1991), we held that the California mechanic's lien, a similar remedy, was preempted. *Id.* at 1130. Appellees contend that *Sturgis* directly controls the outcome of this case because the bonded stop notice

very broadly. Our most recent decision addressing the issue is *Trustees of the Elec. Workers Health & Welfare Trust v. Marjo Corp.*, 988 F.2d 865 (9th Cir. 1993). In *Marjo*, the trustees of various ERISA employee benefit plans were owed money by an electrical subcontractor that had filed for Chapter 11 bankruptcy protection. *Id.* at 866. The trustees sought to obtain the unpaid trust fund contributions from two general contractors who had used the subcontractor, pursuant to a Nevada statute making general contractors liable for any "indebtedness for labor" incurred by any of its subcontractors.[3] *Id.* at 866 n.1. The general contractors removed the actions to federal court and moved for summary judgment. The district court granted summary judgment on the ground that the Nevada statute was preempted by ERISA. *Id.* at 866.

We affirmed the grant of summary judgment. *Id.* at 867. We first noted that the Supreme Court had held that a state law could be preempted by ERISA even if it was not "specifically designed to affect employee ben-

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enforcement provision, Cal. Civ. Code § 3172, "does no more than provide a mechanism through which to enforce a very limited number of mechanic's liens." [Red Brief at 18]. This contention is incorrect. Under California law, a bonded stop notice is an independent mechanism for collecting sums owed to construction workers. Even if a claimant's mechanic's lien is destroyed, the claimant may still attempt to collect his money by giving the construction lender a bonded stop notice. *Rossman Mill & Lumber Co. v. Fullerton Sav. & Loan Ass'n*, 34 Cal. Rptr. 644, 646 (Cal. App. 1963). Because the two are independent remedies, *Sturgis* does not directly control the outcome of this appeal.

[3] The Nevada statute provides that

> Every original contractor making or taking any contract in this state for the erection, construction, alteration or repair of any building or structure, or other work, shall assume and is liable for the indebtedness for labor incurred by any subcontractor acting under, by, or for the original contractor in performing any labor, construction, or other work included in the subject of the original contract . . .

Nev. Rev. Stat. § 608.150(1) (1992).

efit plans." *Id.*, citing *Ingersoll-Rand*, 498 U.S. at 139 ("a state law may 'relate to' a benefit plan, and thereby be pre-empted, even if the law is not specifically designed to affect such plans, or the effect is only indirect."). We then held that the claim was preempted because "[t]he Trustees are attempting to use the Nevada statute to enforce the terms of a plan. To the extent that the enforcement mechanism of the Nevada statute supplements those provided by ERISA, it is preempted." *Id.*[4]

As in *Marjo*, the Trust Funds here are attempting to use the California stop notice remedy to enforce the terms of a plan. Furthermore, like the Nevada statute, the California statute supplements a remedy already provided by ERISAs civil suits under 29 U.S.C. § 1132(a)(3) to enforce plans' rights to contributions under 29 U.S.C. § 1145. Therefore, under the reasoning of *Marjo*, the California stop notice remedy is preempted by ERISA.[5]

IV. Third-Party Beneficiary Claim Under California Law

Article 16.4 of the subcontract between Mark and Stark provided that "[l]abor benefits will be paid under a joint check agreement between [Mark, Stark] & the

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[4] This holding is consistent with decisions from other circuits holding that state law claims are preempted if they seek to enforce the terms of an ERISA plan and supplement remedies already provided by ERISA. *See Diduck v. Kaszycki & Sons Contractors, Inc.*, 974 F.2d 270, 288 (2d Cir. 1992) (state fraud law claim); *1975 Salaried Retirement Plan v. Nobers*, 968 F.2d 401, 406 (3d Cir. 1992) (state contract law claim), *cert. denied*, 113 S. Ct. 1066 (1993); *Van Camp v. AT&T Info. Sys.*, 963 F.2d 119, 123 (6th Cir.) (state civil rights law claim), *cert. denied*, 113 S. Ct. 365 (1992); *Settles v. Golden Rule Ins. Co.*, 927 F.2d 505, 509 (10th Cir. 1991) (state wrongful death law claim).

[5] The California courts have also held that the stop notice statute is preempted by ERISA. *See Carpenters Health & Welfare Trust Fund v. Developers Ins. Co.*, 17 Cal. Rptr. 2d 85, 90 (Cal. App. 1992) *review denied*, 1993 Cal. LEXIS 1775 (Mar. 25, 1993), *and cert. denied*, 114 S. Ct. 91 (1993).

appropriate agency." [ER at 69]. The Trust Funds' complaint asserts a claim under Cal. Civ. Code § 1559[6] seeking to enforce the rights of the Trust Funds as third-party beneficiaries to the subcontract between Mark and Stark. The district court held that this claim was preempted by ERISA.

We agree with the district court. As in *Marjo*, the Trust Funds are attempting to use the California third-party beneficiary statute to enforce the terms of a plan, and the statute merely supplements the ERISA remedy noted above. Therefore, the state third-party beneficiary remedy is preempted by ERISA.

The Trust Funds' strongest argument to the contrary is that the statute is identical in nature to the general Georgia garnishment statute that the Supreme Court held in *Mackey* was not preempted by ERISA. In *Mackey*, a collection agency sought to garnish the vacation and holiday plan benefits of plan members against whom it had obtained money judgments. The trustees of the benefit plan argued that a Georgia statute specifically prohibiting the garnishment of ERISA-covered employee benefit plans barred the collection agency from doing so. The Supreme Court first held that the antigarnishment statute was preempted by ERISA because of the statute's "express reference" to ERISA plans. *Mackey*, 486 U.S. at 830.

The Court then rejected the trustees' argument that the Georgia general garnishment statute was also preempted by ERISA. The Court reasoned that ERISA clearly contemplated the enforcement of money judgments against benefit plans but that it did not provide an enforcement mechanism; consequently, "state-law methods for collecting money judgments must, as a general matter, remain

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[6] This code section provides that "[a] contract, made expressly for the benefit of a third person, may be enforced by him at any time before the parties thereto rescind it." Cal. Civ. Code § 1559 (West 1982).

undisturbed by ERISA; otherwise, there would be no way to enforce such a judgment won against an ERISA plan." *Id.* at 834. The Court also noted that, under Georgia law,

> garnishment is a "procedural" mechanism for the enforcement of judgments. Georgia's statute that provides for garnishment creates no substantive causes of action, no new bases for relief, or any grounds for recovery; the Georgia garnishment law does not create the rule of decision in any case affixing liability. Rather under Georgia law, postjudgment garnishment is nothing more than a method to collect judgments *otherwise* obtained by prevailing on a claim against the garnishee.

Id. at 834-35 n.10 (emphasis added; citation omitted).

Neither of these two anti-preemption rationales applies here. As noted above, ERISA already provides a mechanism for truth funds to collect unpaid benefits. Furthermore, the California third-party beneficiary statute is not simply a "procedural" mechanism for the enforcement of judgments; it creates a separate substantive cause of action that a trust fund may bring to obtain such a judgment in the first place. For this reason, the California third-party beneficiary statute "cannot be brought under the authority of *Mackey*." *Iron Workers Mid-South Pension Fund v. Terotechnology Corp.*, 891 F.2d 548, 556 (5th Cir.), *cert. denied*, 497 U.S. 1024 (1990).

V. Claims Under ERISA and LMRA

The Trust Funds' complaint also asserts a claim under ERISA § 502(a)(2) and (3), which provides for civil suits by plan beneficiaries to redress violations of the terms of a plan. 29 U.S.C. § 1132(a)(2) and (3) (1988). The Trust Funds assert as an alternative basis for the claim LMRA § 301, which establishes federal jurisdiction for "[s]uits for violation of contracts between

an employer and a labor organization." 29 U.S.C. § 185 (a) (1988).

A. *ERISA bases for the claim.*

1. Employer obligation to make contributions.

The Trust Funds first allege that Mark violated ERISA § 515, which provides that

> [e]very *employer* who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement.

29 U.S.C. § 1145 (1988) (emphasis added). ERISA defines an "employer" as "any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan." 29 U.S.C. § 1002(5) (1988). The Trust Funds contended that by agreeing to the joint check provision, Mark was acting "indirectly in the interest of an employer" because it was in the interest of Stark, the direct "employer" for Mark to enter into the subcontract agreeing to make the benefit payments. The district court rejected this argument and dismissed the claim on the ground that Mark was not an "employer" and thus not subject to the obligations of § 515.

Our circuit has never addressed the precise question of whether a nonsignatory to a collective bargaining agreement who agrees in another contract to pay by joint check the benefit contribution obligations of the signatory is a § 1002(5) "employer." [7] The district court relied on two

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[7] The Eleventh Circuit has held that to be a § 1002(5) employer, a company must be a party to the collective bargaining agreement calling for the contributions at issue. *Laborers Local 938 Joint*

of our opinions holding that nonsignatories whose obligations to trust funds are fixed solely by state law cannot be sued as § 515 "employers." In *Carpenters S. Cal. Admin. Corp. v. D & L Camp Constr. Co.*, 738 F.2d 999 (9th Cir. 1984), we held that a surety company, which held a defaulting contractor's license bond and was therefore required under California state law to protect those damaged by the actions of the contractor, was not an 'employer' under ERISA. *Id.* at 1000. We stated that

> Neither the legislative history of ERISA . . . nor of its 1980 amendments . . . indicate that Congress meant to expand the concept of employer or the jurisdiction of the federal courts to include sureties, whose obligations are fixed by contract and regulated by state law for the protection of the public.
>
> The surety that provides a bond pursuant to the California contractor licensing statute is not acting for the benefit of the employer; it is acting for the benefit of those who have been damaged by the employer's failure to pay. [. . .] The protection is aimed at a broad class of entities that deal with contractors, not, as plaintiff would have us believe, primarily as protection of employee benefit plans. Any obligation of the surety to this plaintiff is founded in state, not federal law.

Id. at 1000-01 (citations omitted).

We followed this reasoning in *Carpenters S. Cal. Amin. Corp. v. Majestic Housing*, 743 F.2d 1341 (9th Cir. 1984), which involved a suit by employee benefit trust funds to enforce a mechanic's lien they had filed against a housing developer. The developer had hired a subcon-

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Health & Welfare Trust Fund v. B.R. Starnes Co., 827 F.2d 1454, 1457 (11th Cir. 1987). *See also Giardiello v. Balboa Ins. Co.*, 837 F.2d 1566, 1570 (11th Cir. 1988) (affirming the *B.R. Starnes* holding that signatory status is a prerequisite to qualifying as a § 1002(5) employer.). We decline to adopt such a bright-line rule.

tractor who had failed to make certain fringe benefit contributions due under the terms of a collective bargaining agreement the subcontractor had signed with the union. We held that the developer was not a proper defendant under ERISA § 515 because, like the surety in *D & L Camp*, it was "a non-party to the bargaining agreement that is made responsible by the operation of state [mechanic's lien] law for the failed obligations of the employer." *Id.* at 1346.[8]

Mark's posture is analogous to that of the surety in *D & L Camp* and the developer in *Majestic Housing*. Mark is not a signatory to the collective bargaining agreement, but only to the contract between Mark and Stark. Any responsibility that Mark may have for Stark's obligations—and it is not clear that it bears any such responsibility[9]—therefore derives from state third-party beneficiary law, not the plan or the collective bargaining agreement. Mark and Stark may well have intended the joint check arrangement to benefit the Trust Funds, although it appears that the arrangement was primarily intended to benefit Mark;[10] but no matter how strong that intent and no matter how strong a state law case the Trust Funds may have against Mark but for federal preemption,

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[8] In *Marjo*, we stated that the "broad language" in subsequent Supreme Court and appellate decisions have "placed the continuing validity of our . . . holdings [in *D & L Camp* and *Majestic Housing*] in serious doubt." *Marjo*, 988 F.2d at 867. However, the "holdings" that have been placed in doubt are not the specific findings that the survey company and developer were not ERISA "employers," but rather those cases' narrow view of ERISA preemption—a different issue entirely. Thus, the specific holdings of *D & L Camp* and *Majestic Housing* upon which we rely remain valid.

[9] The California courts have implied that a general contractor may avoid any liability to suppliers of labor or materials by issuing joint checks naming both the subcontractor and the supplier as payees. *See Post Bros. Constr. Co. v. Yoder*, 569 P.2d 133, 135, 137 (Cal. 1977).

[10] See n.9 supra.

the claim asserts a state right of action, not a right under ERISA § 515.

2. Fiduciary status.

The Trust Funds next contend that Mark is an ERISA fiduciary and that Mark breached its fiduciary duty by not making the fringe benefit contributions. The district court dismissed the claim on the ground that the Trust Funds had not alleged that Mark possessed any of the indicia of an ERISA fiduciary. Under ERISA,

> a person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan.

29 U.S.C. § 1002(21)(A) (1988). As the district court noted, the Trust Funds "have not alleged that [Mark] did any of these things or assumed any of these obligations." [ER at 94]. The Trust Funds argue that "[f]acts not before this Court on this appeal of dismissal may well show that Mark assumed and breached a fiduciary duty with respect to the contributions." [Blue Brief at 26.] However, this argument is irrelevant, because in reviewing a Rule 12(b)(6) dismissal this court is limited to the facts pleaded in the complaint. *Love,* 915 F.2d at 1245. In any event, the Trust Funds give no indication of what these "facts" might be.

3. Party in interest.

The Trust Funds also contend that in addition to being an ERISA "employer," Mark is an ERISA "party in in-

terest" to an employee benefit plan. ERISA defines such a "party in interest" as:

> (A) any fiduciary, . . . counsel, or employee of such employee benefit plan;
>
> (B) a person providing services to such plan;
>
> (C) an employer may of whose employees are covered by such plan;
>
> (D) an employee organization any of whose members are covered by such plan;
>
> (E) a [50% or more owner of the voting power, capital interest, or beneficial interest of any] employer or . . . employee organization described in subparagraph (C) or (D);
>
> (F) a relative of [any of the above parties in interest];
>
> (G) a corporation [controlled by any of the above parties in interest];
>
> (H) an employee, officer, director . . . or a 10 percent or more shareholder, directly or indirectly, of [any of the above parties in interest];
>
> (I) a 10 percent or more . . . partner or joint venturer of [any of the above parties in interest].

29 U.S.C. § 1002(14) (1988). We held above that Mark is not a "fiduciary" or an "employer," and the Trust Funds have not alleged that Mark falls into any of the other categories. Mark is therefore not an ERISA "party in interest."

4. ERISA conclusion.

The Trust Funds' complaint fails to show that Mark is an ERISA employer, fiduciary, or party in interest. Therefore, under no set of facts pleaded in the complaint can the Trust Funds show that Mark owes them the contribu-

tions under some ERISA-based duty. We affirm the district court's Rule 12(b)(6) dismissal of the ERISA third-party beneficiary claim.

B. *LMRA basis for action.*

The Trust Funds' complaint also asserts LMRA § 301 as a federal jurisdictional basis for their second claim. The district court relied on a Sixth Circuit case, *Metropolitan Detroit Bricklayers Dist. Council v. J. E. Hoetger & Co.*, 672 F.2d 580 (6th Cir. 1982), to hold that a prime contractor (such as Mark) may not be held liable under § 301 for benefits under a collective bargaining agreement between a subcontractor (such as Stark) and a union (the carpenters). However, the Sixth Circuit in *Hoetger* expressly left open an issue similar to the question facing us:

> If [the contractor] had obligated itself in its contract with [the subcontractor] to escrow amounts due as fringe benefits and had failed to do so . . . [the union and its trust funds] would have had a claim against [the contractor] as third-party beneficiaries, *though not necessarily under § 301(a).*

Id. at 585 n.8 (emphasis added). Therefore, we may not rely on *Hoetger.*

Section 301(a) of the LMRA provides in relevant part that

> [s]uits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

29 U.S.C. § 185(a) (1989). The Trust Funds' first amended complaint alleges that the subcontract between Mark and Stark contains a provision stating that "[l]abor

benefits will be paid under a joint check *agreement* between [Mark, Stark] and the appropriate agency." [ER at 69 (emphasis added)].[11] The Trust Funds' complaint then alleges that

> [i]t was *understood* by MARK, STARK and by the Plaintiffs that payment of required fringe benefit contributions to Plaintiffs were to be made via joint check, naming as Payees both the Carpenters Trust Funds and Stark Construction.
>
> 24. MARK knew weekly the number of carpentry hours for which benefit contributions were due because STARK submitted weekly certified payroll records to MARK. On October 12, 1989, Plaintiffs, who are third-party beneficiaries to the subcontract, notified MARK of the benefit contributions due and requested payment. To date, Defendant MARK has failed and refused to pay to Plaintiffs any amounts in fringe benefit contributions or issue the joint checks *pursuant to* [*the subcontract*].
>
> 25. An actual controversy has arisen and now exists between Plaintiffs and defendant MARK and Plaintiffs desire a judicial determination and declaration of Plaintiffs' rights *under the subcontract* and an injunction requiring defendant MARK to issue a joint check to Plaintiffs and Stark and to deliver it to Plaintiffs and enjoining MARK from its failure and

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[11] The Trust Funds contend that the collective bargaining agreement between Stark and the carpenters' union can furnish the grounds for § 301 jurisdiction. However, any Mark liability to the Trust Funds would have to arise from the Mark/Stark subcontract, or from an alleged agreement among Mark, Stark, and the Trust Funds—not from the collective bargaining agreement (although the amount of liability would have to be determined by the terms of the agreement). Therefore, resolution of the claim would not be "focused upon" the collective bargaining agreement, and § 301 jurisdiction may not be based on it. *See Majestic Housing*, 743 F.2d at 1345.

> refusal to make the payments *as required by the Subcontract.*

[ER at 34-35 (emphasis added)].

We have held that

> [a]ll that is required for jurisdiction to be proper under § 301(a) is that the suit be based on an *alleged breach of contract* between an employer and a labor organization *and* that the resolution of the lawsuit be focused upon and governed by the terms of the contract.

Painting & Decorating Contractors Ass'n v. Painters & Decorators Joint Comm., Inc., 707 F.2d 1067, 1071 (9th Cir. 1983), *cert. denied*, 466 U.S. 927 (1984) (emphasis added). The "contract" at issue need not be a collective bargaining agreement, but only "an agreement between [an] employer[] and [a] labor organization[] significant to the maintenance of labor peace between them." *Retail Clerks Int'l Ass'n v. Lion Dry Goods, Inc.*, 369 U.S. 17, 28 (1962). *See Hotel Employees v. Marriott Corp.*, 961 F.2d 1464, 1466 n.3 (9th Cir. 1992) (letter agreement between Marriott and union, designed to end union opposition to Marriott's involvement in the construction of a large hotel and to guide employment of the hotel staff, is such an agreement); *General Teamsters v. Mitchell Bros. Truck Lines*, 682 F.2d 763, 765-66 (9th Cir. 1982) (strike settlement agreement between union and trucking company is such an agreement).[12]

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[12] At least two of our prior decisions imply that § 301 jurisdiction lies only for disputes arising out the terms of a collective bargaining agreement. *See Lumber Prod. Indus. Workers Local No. 1054 v. West Coast Indus. Relations Ass'n*, 775 F.2d 1042, 1046 (9th Cir. 1985) ("the rights and liabilities of the parties to an action under section 301(a) must be a product of the bargaining agreement itself, and not of some other origin."); *Williams v. Caterpillar Tractor Co.*, 786 F.2d 928, 935 (9th Cir. 1986) (same), *aff'd*, 482 U.S. 386 (1987). These decisions appear to rely erroneously on our decision in *Majestic Housing*, where we held that

No facts have been alleged to establish that the alleged "understanding" constitutes a valid and enforceable contract.[13] In any event, we need not decide whether such an understanding could form the basis for § 301 jurisdiction as an agreement between a labor organization and an employer, even though it is not a collective bargaining agreement. The Trust Funds do not allege that Mark breached this "understanding" or any other agreement between Mark and the Trust Funds contemplated by the subcontract. Rather, the Trust Funds alleges that Mark breached the subcontract itself. Because the subcontract is not a "contract between an employer and a labor organization," the complaint does not allege facts sufficient to provide § 301 jurisdiction.

VI. Attorneys' Fees

Appellees request an award of attorneys' fees. We may award such fees under Fed. R. App. Proc. 38 if we determine that an appeal is "frivolous." An appeal is frivolous when the result is obvious or the appellant's arguments of error are wholly without merit. *McConnell v. Critchlow*, 661 F.2d 116, 118 (9th Cir. 1981). The Trust Funds' appeal was not frivolous; the Trust Funds have made colorable arguments that the district court erred in holding that Mark was not an "employer" and that the state law claims are not preempted by ERISA.[14] We decline to award appellees attorneys' fees under Fed. R. App. P. 38.

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§ 301(a) jurisdiction did not lie because the appellee's rights and liabilities were entirely of statutory origin and did not arise from the collective bargaining agreement. *Majestic Housing*, 743 F.2d at 1345.

[13] The complaint does not elaborate on the nature of the alleged "understanding," such as when and how it came to be, what form it took, and the duties that the parties assumed under it.

[14] We note that *Marjo*, which controls our preemption holdings, was not decided until March 16, 1993, long after the Trust Funds filed their appeal.

Appellees assert 29 U.S.C. § 1132(g)(1)[15] as an alternative basis for an award of attorneys' fees. However, appellees raise this request for the first time on appeal, and we generally will not consider an issue raised for the first time on appeal. *United States v. Mondello*, 927 F.2d 1463, 1468 (9th Cir. 1991). Furthermore, the issue does not qualify for the exception we make for purely legal issues, because deciding it would require the development of a factual record. *See Hummell v. S. E. Rykoff & Co.*, 634 F.2d 446, 453 (9th Cir. 1980) (remanding to district court for determination of, *inter alia*, the degree of the opposing parties' bad faith and the ability of the opposing parties to satisfy an award of fees). We therefore decline to consider the request.

VII. Conclusion

Because ERISA preempts both state law claims asserted by the Trust Funds, and because the Trust Funds cannot state a third-party beneficiary claim against either of the appellees under ERISA or the LMRA, we affirm the district court's dismissal of the action.

AFFIRMED.

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[15] This section provides that

> [i]n any action under this subchapter . . . the court in its discretion may allow a reasonable attorney's fee and costs of action to either party.

29 U.S.C. § 1132(g)(1) (1988).

FERGUSON, Circuit Judge, dissenting in part:

I dissent from Part V. A. of the majority opinion. Section 515 of ERISA, 29 U.S.C. § 1145, was adopted expressly for the purpose of simplifying collection by plan trustees against delinquent employers. *See Laborers Health and Welfare Trust Fund for Northern California v. Advanced Lightweight Concrete Co., Inc.*, 108 S. Ct. 830, 834-35 (1988); *see also Southern California Retail Clerks Union v. Bjorklund*, 728 F.2d 1262, 1265 (9th Cir. 1984). The majority defeats that purpose when it excludes from Section 515 liability those, such as Mark, who enter into express, written agreements to pay into employee trust funds.

The first mistake that the majority makes is to collapse the ERISA definition of employer with its analysis of who is obligated to pay into a multiemployer plan under Section 515. These discussions should proceed separately in order to give each section its intended meaning. *See, e.g., Massachusetts Laborers' Health and Welfare Fund v. Starrett Paving Corp.*, 845 F.2d 23, 24-26 (1st Cir. 1988).

I. The ERISA Definition of Employer

ERISA defines an employer as "any person acting directly as an employer, or *indirectly in the interest of an employer*, in relation to an employee benefit plan." 29 U.S.C. § 1002(5) (emphasis added). The legislative history of ERISA shows that Congress intended to broaden the common-law definition of employer. *See Massachusetts' Laborers*, 845 F.2d at 24-25; *see also Kwatcher v. Massachusetts Service Employees Pension Fund*, 879 F.2d 957, 960 (1st Cir. 1989) ("That ERISA expands the concept of 'employer' beyond common-law or corporate law notions is not much in doubt."). Indeed, this intent is obvious from the plain language of the statute.

Mark, by entering into an express written agreement with Stark to pay the labor benefits of Stark's employees, is unquestionably acting "indirectly in the interests of an employer, in relation to an employee benefit plan." It is incomprehensible that such an explicit undertaking of an employer's responsibility to pay into employee benefit plans could be construed as falling outside of ERISA's broad definition of employer.

It is true, as the majority notes, that the Eleventh Circuit has adopted a bright line rule requiring all ERISA employers to be signatories to collective bargaining agreements. *See Xaros v. U.S. Fidelity & Guar. Co.*, 820 F.2d 1176, 1180 (11th Cir. 1987); *see also Laborers Local 938 Joint Health & Welfare Trust Fund v. B.R. Starnes Co.*, 827 F.2d 1454, 1457 (11th Cir. 1987); *Giardello v. Balboa Ins. Co.*, 837 F.2d 1566 (11th Cir. 1988). The Eleventh Circuit's collapsed analysis incorporates a misguided interpretation of section 515 into its interpretation of section 1002(5), and therefore runs afoul of the plain language of section 1002(5). In short, the Eleventh Circuit's rule is incorrect, and we should decline to follow it.

The majority also relies on two Ninth Circuit decisions, *Carpenter's Southern California Administrative Corporation v. Majestic Housing*, 743 F.2d 1341 (9th Cir. 1984) and *Carpenters Southern California Administrative Corporation v. D&L Camp Construction Company, Inc.*, 738 F.2d 999 (9th Cir. 1984), to support its conclusion that Mark cannot be an employer under ERISA. Assuming arguendo that these cases are still good law, *but see Trustees of Electrical Workers Health and Welfare Trust v. Marjo Corp.*, 988 F.2d 865, 867-68 (9th Cir. 1992), they nonetheless do not support the majority's conclusion.

In *D&L Camp*, the issue was whether the surety of an employer was acting "indirectly in the interests of an employer" under section 1002(5). We found that a surety is not acting "for the benefit of the employer, it

is acting for the benefit of those who have been damaged by the employer's failure to pay," and therefore concluded that a surety's obligations arise solely under state law, not under ERISA. *D&L Camp*, 738 F.2d at 1001. The same cannot be said of Mark, which expressly assumed the employer's obligations to pay labor benefits. In entering into this agreement, Mark was not guaranteeing "protection . . . [to] a broad class of entities that deal with contractors." *Id.* Rather Mark was acting "primarily as [a protector of payments to] employee benefit plans." *Id.* The express agreement between Mark and Stark therefore takes this case out of the ambit of *D&L Camp's* holding.

Majestic Housing is similarly inapposite. In that case, we relied on the reasoning of *D&L Camp* to reach the narrow conclusion that "a non-signatory property owner whose holdings are subject to a state mechanic's lien was [not] intended as a proper defendant in an [ERISA] action to enforce the employer's obligation." *Majestic Housing*, 743 F.2d at 1346. We found that the pension funds' cause of action arose solely under a state mechanic's lien law, and therefore even though the state law was enacted to benefit employee trust funds, ERISA was not implicated. *Id.* Here, Mark expressly assumed the obligation to pay into the employee's benefit funds. The Trust Funds' cause of action thus arises under section 515 of ERISA, as discussed below, and is not solely a function of state law.

In sum, there is no Ninth Circuit precedent controlling the determination of whether Mark is an employer as defined by 29 U.S.C. § 1002(5). However, both the plain language and legislative history of ERISA lead to the inevitable conclusion that Mark is such an employer.

II. Section 515

The majority assumes that, because Mark's express promise to pay labor benefits is contained in a sub-contract with Stark instead of in a collective bargaining agreement, Mark is not obligated under section 515.[1]

Section 515 was enacted for the express purpose of facilitating collection actions by plan trustees against employers who failed to make promised contributions. *Laborers Health and Welfare Trust Fund for Northern California v. Advanced Lightweight Concrete Co., Inc.*, 108 S. Ct. 830, 834 (1988). A host of problems ensue when employers fail to make promised contributions, including loss of benefits from investment income, additional administrative costs, and increased attorneys fees and other legal costs in connection with collection efforts. *Id.* at 834 n. 14 (citing Senate Committee on Labor and Human Resources, 96th Cong., 2d Sess., S. 1076, The Multiemployer Pension Plan Amendments Act of 1980: Summary and Analysis of Consideration 43 (Comm. Print 1980)). To avoid these problems, section 515 gives pension plans a direct cause of action against delinquent employers, without having to contend with claims and defenses unrelated to the employer's promise and the plans' entitlement to the contributions. *Id.* at 835 n. 14.

The essential requirement of section 515 is that there be a *written agreement* to pay into the funds. *See Central States, Southeast and Southwest Areas Pension Fund v. Behnke, Inc.*, 883 F.2d 454, 459 (6th Cir. 1989). Whether that promise is contained in a collective bar-

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[1] Section 515 provides:

> Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms of the collective bargaining agreement.

29 U.S.C. § 1145.

gaining agreement or in a separate contract to pay benefits is immaterial. *See Central States, Southeast and Southwest Areas Pension Fund v. Gerber Truck Services, Inc.*, 870 F.2d 1148, 1153-54 (7th Cir. 1989) (en banc) (the agreement to contribute to a pension plan "need not be a formal collective bargaining agreement"); *see also Behnke*, 883 F.2d at 460 ("Although [the writings obligating the employer] are not collective bargaining agreements, they sufficiently comport with the writing requirement[] of . . . ERISA"). Here, Stark was obligated to pay into the pension funds pursuant to a collective bargaining agreement. Stark then entered into a written contract with Mark, a provision of which obligated Mark to pay labor benefits. Mark, by virtue of the written agreement with Stark, is obligated to pay into the pension funds. The fact that Mark's obligation arises from a separate, written contract does not exempt Mark from ERISA liability.

The majority attempts to cast Mark's obligation to pay as a state law obligation arising out of the Trust Funds status as a third-party beneficiary to the contract between Mark and Stark. It is true that the Trust Funds' cause of action is based on the written agreement between Stark and Mark. However, section 515 of ERISA gives employee pension funds a cause of action "independent of the contract on which the duty to contribute is based and [which] may be enforced by an action brought in federal district court." *Butiminous Coal Operators' Association, Inc. v. Connors*, 867 F.2d 625, 633 (D.C. Cir. 1989). The Trust Funds' status as a third-party beneficiary therefore does not defeat its claim under ERISA. In fact, *all* actions under section 515 of ERISA are essentially grounded in an employee pension fund's status as a third-party beneficiary. *See Benson v. Brower's Moving & Storage*, 907 F.2d 310, 313-14 (2d Cir. 1990) (section 515 transforms pensions funds from ordinary third-party beneficiaries into parties analogous to holders

in due course, not subject to any of the promisee's defenses); *see also Gerber Truck Service*, 870 F.2d at 1151.

Conclusion

In sum, it is contrary to the plain meaning and expressed intention of the relevant sections of ERISA to conclude that those who promise in writing to pay employee benefits are not subject to ERISA liability. The majority's decision will make it all too easy for employers to contract away their duty to make payments, leaving the pension funds with no recource under either state or federal law. This result will undermine the ability of pension funds to deliver benefits to workers. ERISA was enacted to eliminate just this type of problem: "In enacting ERISA . . . Congress sought to prevent the losses suffered by employees and their families when vested pension benefits were not paid because a pension plan was terminated before sufficient funds had accumulated." *Korea Shipping Corp. v. New York Shipping Ass'n*, 880 F.2d 1531, 1536 (2d Cir. 1989). Therefore, I must dissent.

APPENDIX B

[Filed May 24, 1991]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

No. CIV-S-90-0239 MLS/JFM

CARPENTERS HEALTH AND WELFARE TRUST FUND FOR CALIFORNIA, CARPENTERS PENSION TRUST FOR NORTHERN CALIFORNIA, CARPENTERS VACATION AND HOLIDAY TRUST FUND FOR NORTHERN CALIFORNIA, CARPENTERS APPRENTICESHIP AND TRAINING TRUST FUND FOR NORTHERN CALIFORNIA, and CARPENTERS ANNUITY TRUST FUND FOR NORTHERN CALIFORNIA,
Plaintiffs,

v.

TRI CAPITAL CORPORATION and DOES 1-80,
Defendants.

ORDER

This matter was heard by the court on April 19, 1991, and the court orally provided its ruling at that time. Pursuant to that oral ruling, it is hereby ordered that plaintiffs' motion to remand and for sanctions is denied, and defendants' counter-motion to dismiss is granted for the reasons stated in the attached transcript of the court's ruling. Plaintiffs requested and were granted 30 days from April 19, 1991, to file an amended complaint if they chose to do so.

DATED: May 24, 1991.

/s/ Hon. Milton L. Schwartz
HON. MILTON L. SCHWARTZ
United States District Court Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE: MILTON L. SCHWARTZ, JUDGE

No. CIVS 90-0239

CARPENTERS HEALTH AND WELFARE
TRUST FUND FOR CALIFORNIA, *et al.*,
Plaintiff,

vs.

TRI CAPITAL CORPORATION, *et al.*,
Defendants.

REPORTER'S TRANSCRIPT

APRIL 19, 1991

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[3]

SACRAMENTO, CALIFORNIA,
FRIDAY, APRIL 19, 1991

9:00 A.M.

THE COURT: This action is before the Court today on plaintiffs' motion to remand and for sanctions under 28 U.S.C. Section 1447(c) and Rule 11 respectively, and defendants' counter motion to dismiss under Rule 12(b)(6) of Federal Rules of Civil Procedure.

Turning first to plaintiffs' motion to remand, the first basis for the claim for remand has to do with the role, if any, of the entity Mark Diversified in the removal.

Plaintiffs assert the position that this case was removed improperly because removal was effected by an alleged non-party, Mark Diversified, Inc., which was the general contractor. The Court believes that there is no merit to this particular contention on the part of plaintiffs. Removal was reportedly effected by both Mark Diversified, Inc. and the named defendant named in the caption of the pleading, specifically Tri Capital.

Thus, even if Mark Diversified is not a proper defendant in this case, the joinder by Tri Capital in the removal cures any alleged procedural defect.

Furthermore, plaintiffs failed to contest this alleged procedural defect in removal within 30 days of [4] the filing of the notice of removal as required by 28 U.S.C. Section 1447(c).

The Court notes that defendant was in a position where it had really very little choice; "Doe" practice is recognized in state courts in California, at least, and there was a suggestion clearly made by Mark Diversified that it was intended to be sued as Doe One, or whatever the number was, and therefore in effect asserted, "I'm here and I acknowledge that I am being sued, and I move to remove the case, and file a petition for removal."

The named defendant was Tri Capital who joined in the motion, so even if we ignore Mark Diversified's action as being so-called out of the chain of title, the removal by Tri Capital is certainly proper and appropriate if it's the only defendant.

Then I turn to the basis for taking subject matter jurisdiction over the case upon removal and analyze that on the basis of the substantive aspect.

Plaintiffs originally filed this case in San Joaquin County Superior Court on December 21, 1989. The case, as I have just said, was removed by Mark Diversified and Tri Capital on February 23, 1990. Defendant

contends that removal was proper because the case allegedly raises issues relating to the enforcement of rights under an employee benefit plan governed by ERISA. 29 U.S.C. [5] Section 1001 and following. They also contend that this case raises issues relating to the enforcement of rights under a collective bargaining agreement governed by Section 301 of the Labor Management Relations Act, 29 U.S.C. Section 185.

The Court has determined that plaintiffs' state law claim "relates to" an employee benefit plan within the meaning of Section 514(a) of ERISA, 29 U.S.C. Section 1144(a), and thus the Court finds that ERISA—and I put this in quotes because they are terms of art in this particular context—"completely preempts" plaintiffs' state law claim. The Court cites to the same case that counsel for plaintiffs has been arguing to the Court for the opposite results; that is, Metropolitan Life Insurance Company vs. Taylor, 481 U.S. 58 (1987). Also Iron Workers Pension Fund vs. Terotechnology, 891 F. 2nd 548 (Fifth Circuit 1990).

Moreover, the Court finds that ERISA provides a claim which supplants plaintiffs' state law claim.

Plaintiffs, all of whom are fiduciaries within the meaning of ERISA, are entitled to bring suit to enforce ERISA provisions under Section 1132(a)(3)(ii) of Title 29.

More specifically, plaintiffs are entitled to enforce the terms of a collective bargaining agreement [6] which requires contributions to a multiemployer plan. Citing 29 U.S.C. Section 1145.

Since ERISA both completely preempts and supplants plaintiffs' state law claim, this Court finds that removal was proper, and that this Court has subject matter jurisdiction. Young vs. Anthony's Fish Grottos, Inc., 830 F. 2nd 993 (Ninth Circuit 1987). The Court therefore finds that it must and does deny plaintiffs' motion to remand this case to state court.

I turn next then to defendants' motion to dismiss. In addressing the remand issue, the Court has already de-

termined that plaintiffs' state law claim is completely preempted by ERISA and supplanted by an ERISA claim. Plaintiffs' complaint fails to state a claim upon which relief may be granted for the reason that it proceeds against parties other than would be permitted under the remedy provided by ERISA. Therefore, the Court must grant the motion of defendant to dismiss the claim before this Court under Rule 12(b)(6).

This leaves the situation in something of a dilemma. ERISA does in fact provide a remedy. It provides a remedy presumably against the employer of the aggrieved party. That means that if the Court dismissed under Rule 12(b)(6) with leave to amend, then plaintiff would be in the position of amending by naming a new [7] party defendant and seeking whatever remedy is available under ERISA. That generates all kinds of problems as to whether there would be a relation back, whether there would be a statute of limitations problem, whatever. I can't anticipate those things. I can only deal with what I believe the law to be.

Having found, as I have, that there is preemption, and that plaintiffs are limited to whatever the ERISA remedy is, which it seems to me is nothing more than an action against the employer, I think I will leave it up to plaintiffs to tell me whether they want this motion—which I will be granting—for dismissal to be granted with leave to amend, or whether you want to simply proceed either in state court, if you can, or proceed on appeal.

MR. RAISNER: Well, your Honor, I believe that we would request that it be with leave to amend. However, I do anticipate filing an appeal.

THE COURT: I beg your pardon?

MR. RAISNER: I do anticipate appealing.

THE COURT: If you amend, obviously I can't judiciously rule in advance on things, but it's pretty obvious from my ruling that the only cause of action that could be stated in light of my ruling in this court would be an action for whatever entitlement plaintiffs feel [8]

they have coming against the employer. So if you simply amend to make some other allegations, that one is going to go down the tubes also. As long as you know where we are—

MR. RAISNER: I think it's quite clear where we are, your Honor.

THE COURT: All right.

How much time do you want to amend?

MR. RAISNER: Thirty days would be fine.

THE COURT: All right.

There is, of course, the remaining motion of plaintiffs for assessment of sanctions, and the Court denies that motion on the ground that obviously it does not feel that defendants' position is unsupportable.

APPENDIX C

[Filed Jan. 3, 1992]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

No. CIV-S-90-0239 MLS/JFM

CARPENTERS HEALTH AND WELFARE TRUST FUND FOR CALIFORNIA, CARPENTERS PENSION TRUST FOR NORTHERN CALIFORNIA, CARPENTERS VACATION AND HOLIDAY TRUST FUND FOR NORTHERN CALIFORNIA, CARPENTERS APPRENTICESHIP AND TRAINING TRUST FUND FOR NORTHERN CALIFORNIA, and CARPENTERS ANNUITY TRUST FUND FOR NORTHERN CALIFORNIA,
Plaintiffs,

v.

TRI CAPITAL CORPORATION and DOES 1-80,
Defendants.

ORDER ON DEFENDANTS' MOTION TO DISMISS

This matter came before the court on defendants' motion to dismiss the First Amended Complaint pursuant to Fed. R. Civ. Proc. 12(b)(6). Christian L. Raisner appeared for plaintiffs, and James M. Nelson appeared for defendants.

The court announced its disposition of the motion and its reasons therefor into the record and ordered defendants to prepare a formal order consistent therewith.

Defendants' motion to dismiss all claims in the First Amended Complaint for failure to state a claim is granted

with prejudice and without leave to amend for the reasons set forth in the transcript attached hereto.

IT IS SO ORDERED.

DATED: Jan. 3, 1992.

/s/ Hon. Milton L. Schwartz
HON. MILTON L. SCHWARTZ
U.S. District Court Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE MILTON L. SCHWARTZ, JUDGE

No. CIV. S-90-239

CARPENTERS HEALTH AND WELFARE TRUST FUND FOR CALIFORNIA, CARPENTERS PENSION TRUST FOR NORTHERN CALIFORNIA, CARPENTERS VACATION AND HOLIDAY TRUST FUND FOR NORTHERN CALIFORNIA, CARPENTERS APPRENTICESHIP AND TRAINING TRUST FUND FOR NORTHERN CALIFORNIA, and CARPENTERS ANNUITY TRUST FUND FOR NORTHERN CALIFORNIA,
Plaintiffs,

vs.

TRI CAPITAL CORPORATION, MARK DIVERSFIED, INC., and DOES 1-80,
Defendants.

REPORTER'S TRANSCRIPT OF PROCEEDINGS
MOTION TO DISMISS
JUDGE'S RULINGS

Friday, December 13, 1991

---

[1] SACRAMENTO, CALIFORNIA

FRIDAY, DECEMBER 13, 1991, A.M.

THE COURT: The following is the Court's decision on the motion that is before me. And I'm going to ask counsel to make arrangements with the reporter for a transcript of what I'm about to say so that you can attach it to simply a brief order, and then, in effect, it will recite the Court's order and then say "for the reasons and upon the grounds set forth in the transcript attached," which needs to be physically attached.

Defendants have moved under Rule 12(b)(6) of Federal Rules of Civil Procedure to dismiss plaintiffs' first amended complaint for failure to state a claim upon which relief can be granted.

In considering such a motion, the Court must construe the complaint in the light most favorable to the pleader, taking the allegations as true. The Court may dismiss the complaint if it appears beyond doubt that plaintiffs can prove no set of facts that would entitle them to relief under the existing law.

The Court has previously dismissed plaintiffs' first claim for relief, which is now characterized as the first claim, or rather I think it's spelled out as the first cause of action. And that claim seeks enforcement [2] of a stop notice under California law.

The reason plaintiffs have reasserted that first claim or cause of action is, they represent, because they wish to preserve that claim in the event of an appeal. And the Court understands that it is the same claim as the Court dismissed with leave to amend, and that claim has not been amended. That's the same claim that has been reasserted.

In the second claim or cause of action—and rather than repeat both, we refer to those as claims in the Federal Court, but I'm going to use your terminology and call it cause of action. But they are synonymous for these purposes.

In plaintiffs' present second cause of action under their first amended complaint, they seek declaratory and injunctive relief, and they invoke both Section 502 of the Em-

ployee Retirement Income Security Act of 1974,_ 29 U.S.C. Section 1332(a). And we will refer to that as by section number and by ERISA. They also invoke Section 301 of the Labor Management Relations Act, LMRA, 29 U.S.C. Section 185.

The facts are that plaintiffs are a multiemployer benefit plan under ERISA who are parties to a collective-bargaining agreement with one Rodney Stark who does business as Stark Construction. Stark is not a [3] party to this lawsuit.

Generally, plaintiffs claim that, in a subcontract with Stark, defendant Mark agreed to pay jointly labor benefits due under a collective-bargaining agreement between plaintiffs and Stark. The benefits were never paid, and Stark apparently is in bankruptcy. And plaintiffs are looking to Mark for the collection of these contracted for benefits.

Plaintiffs premise their ERISA claim on an alleged violation of ERISA, specifically Section 1145 of Title 29, which is also referred to as and called Section 515 of ERISA, which deals with delinquent plan contributions. Section 515 provides that "every employer who is obligated to make contributions" under a benefit plan or collective-bargaining agreement shall make them in accordance with the terms of the plan.

Defendant Mark insists that it is not an employer as that term is defined in Section 1002(5) of ERISA. That section defines an employer as "any person acting directly as an employer or indirectly in the interest of an employer in relation to an employee benefit plan."

When you first look at it, it might appear that Mark, who contracted with Stark for joint payment of labor benefits, thereby acted "indirectly in the interest" of an employer, but courts have widely refused [4] to expand the definition of employer under ERISA to reach an entity that is not a party to the collective-bargaining agreement.

The Ninth Circuit in Carpenters Southern California Administrative Corp. vs. Majestic Housing, 743 Federal

2d 1341 (1984), held that a nonsignatory contractor whose subcontractor failed to meet pension plan payment obligations could not be held liable as an employer under ERISA.

In Carpenters Southern, the same plaintiff, and I'm now referring to Carpenters Southern California Administrative Corp. vs. D & L Camp Construction Company, 738 Federal 2d 999 (9th Circuit 1984), the court held that a nonsignatory surety company is not an employer under the statutory definition.

In this case defendant Mark's subcontractual agreement to help pay Stark's obligations under the collective-bargaining agreement does not appear to this Court to be different from the actions of a surety who also promises to pay another's obligations. This Court can discern no meaningful link between defendant Mark and ERISA's definition of employer.

Plaintiffs also claim that defendant Mark breached a fiduciary duty in regard to the plan within the meaning of ERISA Sections 409(a) and 502(a)(2), which are found [5] in the statute, Title 29, U.S.C. Sections 1109 (a) and 1132(a)(2) respectively. But under Section 33(21)(A), to be a fiduciary of a benefit plan, a person must either:

One, exercise authority regarding management of the plan;

Two, render investment advice or have authority to; or

Three, have discretionary administrative authority or responsibility.

Plaintiffs have not alleged that defendant Mark, a construction contractor, did any of these things or assumed any of these obligations.

Plaintiffs' second claim also invokes Section 301 of the Labor-Management Relations Act, which is codified in 29 U.S.C. Section 185(a). That section authorizes suits "for violations of contracts between an employer and a labor organization."

The question whether a prime contractor may be held liable under Section 301 for benefits owed under a collective-bargaining agreement between a subcontractor and union was answered in the negative in Metropolitan Detroit Bricklayers vs. J. E. Hoetger & Company, 672 Federal 2d 580 (6th Circuit 1982).

Finally, plaintiffs' third cause of action arises under California contract law and is asserted as an [6] alleged pendent state law claim under a theory of third-party beneficiary contract in common law or California law. That section of the California Civil Code, Section 1559, provides for an action by a third-party beneficiary to enforce a contract made expressly for its benefit. This state law claim is preempted by ERISA, in that it relates state contract law to the employee benefit plan under which the benefits are said to be due.

So long as plaintiffs persist in invoking their entitlement under the collectively bargained employee benefit plan, they raise the specter of federal ERISA and possibly LMRA preemption. But as the Court has previously held, plaintiffs have no ERISA cause of action against Mark, who is not an employer, in this Court's understanding of the term, under ERISA.

Therefore, it is the holding of this Court that plaintiffs do not have a valid ERISA or LMRA claim against defendant Mark.

Accordingly, because plaintiffs can prove no set of facts that would entitle them to relief in this court under either ERISA or LMRA, the Court grants defendants' motion to dismiss the entire complaint with prejudice. And when I say "with prejudice," I mean without leave to amend. [7] Now, I do not wish to preclude plaintiffs from seeking to litigate any state law claims that they think they may still have growing out of this series of facts or factual scenario. And I think I am going to modify my order as follows:

I'm going to and do order dismissed the first and second causes of action in the first amended complaint.

The first cause of action being a purely state law claim which I have previously held was preempted, I'm going to dismiss that claim, for whatever it means, without prejudice.

I'm going to dismiss the second cause of action, which alleges ERISA and LMRA violations, with prejudice on the ground that neither of those claims can be asserted against defendant Mark.

And I'm going to dismiss the third cause of action, which, once again, is alleged to be purely a state law cause of action, without prejudice.

But I am not going to permit amendment of either of those causes of action in this court, because there is no further federal claim present in this case, inasmuch as I have dismissed the two federal claims which are embodied in the second cause of action.

I want the record to show that I am dismissing the first and third causes of action without prejudice to [8] plaintiffs' right, if it thinks it has such a right, to proceed in another jurisdiction. But I'm dismissing on the basis really of United Mine Workers vs. Gibbs, that, discretionarily, when there is no further federal claim before the Court, this Court is not required to keep the other two causes of action.

Now, I don't know what position that puts you people in administratively. I have stated what I'm doing and why I'm doing it. I will listen to any questions that you have or any problems that you have with this precise ruling.

MR. RAISNER: Your Honor, just one question occurs to me, which is that the matter originally came to this court on removal, and perhaps an order of remand should be made as to the first cause of action in any case.

THE COURT: I'm not going to remand it for the reason that I don't think you've got a state law cause of action, and it is my firm, strong belief that you don't have, because I think that your state law causes of action are fully preempted. That's why I'm dismissing them.

But for whatever value it may be with respect to res judicata, if you can successfully assert a claim in some other court that feels that it has jurisdiction, then each court has to decide its own jurisdiction. [9] That's why I'm not taking the additional step, because if I remand it, then it just forces it back there, and I don't think you've got a cause of action. But maybe you do. Maybe you want to proceed by appeal of my decision also. I want to perfect your rights all the way around.

MR. RAISNER: I expect that we will proceed by way of appeal, but I only have a concern about the res judicata issue. And I appreciate your Honor's addressing that. I'm not certain, however, whether a statement made by the Court actually meets the requirements of eviscerating the possible effect of res judicata in any case.

THE COURT: I'm not sure either. If I remand those two causes of action, it would be tantamount to my saying I'm not passing any judgment on these two causes of action; they may be valid, but I don't want them here. That isn't what I'm saying.

I don't think you have any state law causes of action left, unfortunately. I think they've been preempted. I'm making the dismissal as to those two causes of action without prejudice but not permitting an amendment, because I'm dismissing them because there's no longer a federal case in front of me.

Are you having some problem with that?

MR. NELSON: Yes, your Honor. I guess what I'm [10] agonizing over is whether we need something akin to Rule 54(b) language to make it clear that this is a final determination by this Court, and it starts the clock running on appeal.

THE COURT: Well, it is a final determination, and I will say so for this reason: That I am not permitting an amendment to either the first or the third cause of action. I am dismissing those causes of action, and the specific reason is that there is no federal claim before

the Court. And I am dismissing the second cause of action with prejudice.

MR. NELSON: I guess what I'm having trouble is that if, as I understand your ruling, the plaintiff here could take it with a couple of the facts but pursue in the same theory on the first claim, go back to San Joaquin Superior Court and file the same claim, which would put us in the position of again removing back here based on the same theory as we used previously, I just wonder if we're just creating a potential for duplicating procedures over and over again.

THE COURT: Rather than clutter up the decision of the Court, the balance of our discussion will not be part of the decision, although it will be on the record.

* * * * (Proceedings reported, not transcribed.)

THE COURT: I'm going to modify the ruling that I [11] just enunciated, because I am now satisfied that I will not be serving any parties' best interests by the ruling as it now stands, since if the first and/or third causes of action are refiled in state court, the defendant will simply remove on the grounds of alleged total preemption, and plaintiffs will not have an opportunity to argue before the state court that they have a state court claim that is not preempted.

Consequently, I'm going to modify the ruling to simply specify that all three causes of action for claims set forth in the first amended complaint are dismissed with prejudice and that the first and third claims are dismissed, in the alternative, on two bases: One, that there's no longer a federal claim before this Court after having dismissed the second cause of action; and, alternatively and independently, that this Court can state no assertion of a viable claim in either the first or third causes of action under state law because the Court believes that those two claims have been totally preempted by federal law, and that, therefore, they fall along with the dismissal of the second claim.

This then makes it abundantly clear what the Court's ruling is, and why and on what basis. It is clearly a final judgment and decision of this Court, and it clearly is ripe for appeal from the entry of this.

[12] MR. NELSON: Thank you.

(Proceedings were concluded.)

APPENDIX D

[Filed Jul. 13, 1994]

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 92-15112

D.C. No. CV-90-00239-MLS

CARPENTERS HEALTH AND WELFARE TRUST FUND FOR CALIFORNIA, CARPENTERS PENSION TRUST FUND FOR NORTHERN CALIFORNIA, CARPENTERS VACATION AND HOLIDAY TRUST FUND FOR NORTHERN CALIFORNIA, CARPENTERS APPRENTICESHIP AND TRAINING TRUST FUND FOR NORTHERN CALIFORNIA, CARPENTERS ANNUITY TRUST FUND FOR NORTHERN CALIFORNIA,
Plaintiffs-Appellants,

v.

TRI CAPITAL CORP., MARK DIVERSIFIED,
Defendants-Appellees,

ORDER

Before: FERGUSON, CANBY, and BRUNETTI, Circuit Judges.

Judges Canby and Brunetti have voted to deny the petition for rehearing and to reject the suggestion for a rehearing en banc. Judge Ferguson has voted to grant the petition for rehearing. As a senior Judge, he cannot vote on the en banc suggestion.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

APPENDIX E

STATUTES INVOLVED

A. Employee Retirement Income Security Act of 1974, as amended:

Section 3(5), 29 U.S.C. § 1002(5), provides:

> (5) The term "employer" means any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan; and includes a group or association of employers acting for an employer in such capacity.

Section 3(21)(A), 29 U.S.C. § 1002(21)(A), provides:

> (21)(A) Except as otherwise provided in subparagraph (B), a person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan. Such term includes any person designated under section 1105(c)(1)(B) of this title.

Section 502(a), 29 U.S.C. § 1132(a), provides:

> (a) Persons empowered to bring a civil action
>
> A civil action may be brought—
>
> (1) by a participant or beneficiary—
>
> (A) for the relief provided for in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan;

(4) by the Secretary, or by a participant, beneficiary for appropriate relief in the case of a violation of 1025(c) of this title;

(5) except as otherwise provided in subsection (b) of this section, by the Secretary (A) to enjoin any act or practice which violates any provision of this subchapter, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this subchapter.

(6) by the Secretary to collect any civil penalty under subsection (c)(2) or (i) or (*l*) of this section;

(7) by a State to enforce compliance with a qualified medical child support order (as defined in section 1169(a)(2)(A) of this title); or

(8) by the Secretary, or by an employer or other person referred to in section 1021(f)(1) of this title, (A) to enjoin any act or practice which violates subsection (f) of section 1021 of this title, or (B) to obtain appropriate equitable relief (i) to redress such violation or (ii) to enforce such subsection.

Section 514(a), 29 U.S.C. § 1132(a) provides:

> Except as provided in subsection (b) of this section, the provisions of this subchapter and subchapter III of this chapter shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan described in section 1003(a) of this title and not exempt under section 1003(b) of this title.

Section 515, 29 U.S.C. § 1145, provides:

> Every employer who is obligated to make contributions to a multiemployer plan under the terms of the plan or under the terms of a collectively bargained agreement shall, to the extent not inconsistent with law, make such contributions in accordance with the terms and conditions of such plan or such agreement.

B. The California Civil Code provides:

> **§ 1559. When contract for benefit of third person may be enforced.** A contract, made expressly for the benefit of a third person, may be enforced by him at any time before the parties thereto rescind it.

> **§ 3111. Trust fund for payment of fringe benefits supplemental to wage agreement.** For the purposes of this chapter, an express trust fund established pursuant to a collective bargaining agreement to which payments are required to be made on account of fringe benefits supplemental to a wage agreement for the benefit of a claimant on particular real property shall have a lien on such property in the amount of the supplemental fringe benefit payments owing to it pursuant to the collective bargaining agreement.

> **§ 3159. Stop notice to construction lender.** Any of the persons named in Sections 3110, 3111, and 3112 may, prior to the expiration of the period

within which his or her claim of lien must be recorded under Chapter 2 (commencing with Section 3109), give to a construction lender a stop notice or a bonded stop notice. If a payment bond has previously been recorded in the office of the county recorder where the site is located in accordance with Section 3235 or in accordance with Section 3162, then the construction lender shall withhold funds pursuant to a bonded stop notice filed by an original contractor and may, at its option, withhold funds pursuant to a stop notice or bonded stop notice given by anyone other than an original contractor. The construction lender may elect not to withhold pursuant to a bonded stop notice by reason of a payment bond having previously been recorded in the office of the county recorder of the county where the site is located in accordance with Section 3235. If, when giving the construction lender the stop notice or bonded stop notice, the claimant makes a written request for notice of the election, accompanied by a preaddressed, stamped envelope, the construction lender shall furnish the claimant a copy of the bond within 30 days after making the election. A lender shall not be liable for a failure to furnish a copy of the bond if the failure was not intentional and resulted from a bona fide error, if the lender maintains reasonable procedures to avoid such an error, and if the error was corrected not later than 20 days from the date on which the violation was discovered. The payment bond may be recorded at any time prior to the serving of the first stop notice. The notice may only be given for materials, equipment, or services furnished, or labor performed. In the case of a stop notice or bonded stop notice filed by the original contractor or by a subcontractor contracting directly with an owner, the original contractor or subcontractor shall only be entitled to recover on his or her stop notice or bonded stop notice the net amount due the original contractor or

subcontractor after deducting the stop notice claims of all subcontractors or material suppliers who have filed bonded stop notices on account of work done on behalf of the original contractor or the subcontractor.

§ 3162. Rights, duties and liabilities of construction lender upon receipt of stop notice. Upon receipt of a stop notice pursuant to Section 3159, the construction lender may, and upon receipt of a bonded stop notice the construction lender shall, withhold from the borrower or other person to whom it or the owner may be obligated to make payments or advancement out of the construction fund, sufficient money to answer the claim and any claim of lien that may be recorded therefor. If a payment bond has previously been recorded in the office of the county recorder where the site is located in accordance with Section 3235, then the construction lender shall withhold funds pursuant to a bonded stop notice filed by an original contractor and may, at its option, withhold funds pursuant to a stop notice or bonded stop notice given by anyone other than an original contractor. The construction lender may elect not to withhold pursuant to a bonded stop notice by reason of a payment bond having previously been recorded in the office of the county recorder of the county where the site is located in accordance with Section 3235. If, when giving the construction lender the stop notice or bonded stop notice, the claimant makes a written request for notice of the election, accompanied by a preaddressed, stamped envelope, the construction lender shall furnish the claimant a copy of the bond within 30 days after making the election. A lender shall not be liable for a failure to furnish a copy of the bond if the failure was not intentional and resulted from a bona fide error, if the lender maintains reasonable procedures to avoid such an error, and if the error

was corrected not later than 20 days from the date on which the violation was discovered. The payment bond may be recorded at any time prior to the serving of the first stop notice.

§ 3172. Action to enforce payment of claims stated in stop notice. An action against the owner or construction lender to enforce payment of the claim stated in the stop notice or bonded stop notice may be commenced at any time after 10 days from the date of the service of the stop notice upon either the owner or construction lender and shall be commenced not later than 90 days following the expiration of the period within which claims of lien must be recorded as prescribed in Chapter 2 (commencing with Section 3109). No such action shall be brought to trial or judgment entered until the expiration of said 90-day period. No money shall be withheld by reason of any such notice longer than the expiration of such 90-day period unless such action is commenced. If no such action is commenced, such notice shall cease to be effective and such moneys shall be paid or delivered to the contractor or other person to whom they are due. Notice of commencement of any such action shall be given within five days after commencement thereof to the same persons and in the same manner as provided for service of a stop notice or bonded stop notice.

Supreme Court, U.S.
FILED
NOV 4 1994
OFFICE OF THE CLERK

No. 94-635

In The

Supreme Court of the United States

October Term, 1994

CARPENTERS HEALTH AND WELFARE TRUST FUND FOR CALIFORNIA, CARPENTERS PENSION TRUST FUND FOR NORTHERN CALIFORNIA, CARPENTERS VACATION AND HOLIDAY TRUST FUND FOR NORTHERN CALIFORNIA, CARPENTERS APPRENTICESHIP AND TRAINING TRUST FUND FOR NORTHERN CALIFORNIA, AND CARPENTERS ANNUITY TRUST FUND FOR NORTHERN CALIFORNIA,

Petitioners,

v.

TRI-CAPITAL CORPORATION; MARK DIVERSIFIED, INC.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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RESPONDENTS' STATEMENT OF QUESTIONS PRESENTED

1. Does ERISA § 515 impose liability on a general contractor as the ERISA "employer" of a delinquent subcontractor's employees based solely on a joint check clause included in the subcontract to protect the general contractor from potential state mechanics' lien liability for subcontractor delinquent contributions?

2. Does amendment of a complaint in a removed action to add a claim within the exclusive subject matter jurisdiction of the federal court and entry of final judgment in the case waive the right to appeal whether the original complaint was properly removed?

3. Is federal question removal jurisdiction over claims that are deemed to be federal under the Complete Preemption Doctrine as articulated in *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, (1987), negated by the fact that the artfully pled claim is brought against an improper party in addition to being based on a completely preempted theory?

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I

RESPONDENTS' STATEMENT OF THE CASE

Mindful of the admonition in Supreme Court Rule 15.1 and the request for brevity in Rule 24, Respondents offer a brief correction and supplementation to Petitioners' Statement of the Case. Although Petitioners' description of the proceedings and rulings below is stilted, the opinions, orders and transcripts in the Appendix to the Petitioners' brief speak for themselves.

Respondents cannot, however, ignore the inaccuracies and omissions regarding the agreement between Respondent Mark Diversified, Inc. ("Mark") and the delinquent subcontractor, Stark Construction ("Stark"). Similarly, Respondent Tri Capital Corporation ("Tri Capital") objects to the inference that there was any kind of an agreement between it and Stark or the Petitioners regarding payment of Stark's employee benefit obligations. The statements and innuendo by Petitioners in this regard are contained in the first full paragraph on page 3 of Petitioners' brief.

As the Petitioners note, these cases were resolved pursuant to motions to dismiss under Fed. R. Civ. Proc. 12(b). Respondents recognize here, as they did below, that they must concede all facts alleged in the complaint for purposes of the motion which was granted and affirmed by the lower courts.

A. The Relationship Between the Parties.

Respondent Mark Diversified, Inc. is a non-union general contractor which was hired to construct a project

known as O'Conner-Woods. Mark has no relationship to the Petitioners and is not signatory to any collective bargaining agreements. Mark had no contract with Petitioners or a union compelling it to contribute to benefit programs funded through the Petitioners.

Stark Construction was a subcontractor on the O'Conner-Woods projects. Stark is alleged to have been signatory to a collective bargaining agreement with one or more carpenter union locals. Stark was, according to the complaint, obligated to contribute to the Petitioners.

Respondent Tri Capital Corporation was a construction lender on the O'Conner-Woods project. The complaint does not allege that Tri Capital had any agreement with either Stark or the Petitioners or had any relationship of any kind with Petitioners before this action was filed.

B. The Subcontract Language.

The dubious factual platform on which Petitioners have erected their various legal theories consists of one paragraph in the complaint which, in turn, quotes one paragraph in the subcontract between Mark and Stark. Paragraph 23 of the Amended Complaint alleges:

> The aforementioned subcontract, Exhibit "F" hereto, (hereinafter "Subcontract") was entered into by Mark and Stark on or about December 2, 1988. In that subcontract, Mark expressly agreed to pay fringe benefit contributions. Article 16.4 of said subcontract provides:

> '5) Labor benefits will be paid under a joint check agreement between MDI [Mark Diversified, Inc.], Stark Construction, and the appropriate agency.' (text as in original of Amended Complaint).

Conspicuously absent from the complaint (or the contract incorporated into it) is language through which Mark obligates itself to pay sums in excess of the amount due to Stark under the subcontract. Indeed, Mark's goal was just the opposite – Mark did not want to be placed into a position where it had liability for trust fund contributions of subcontractors such as Stark.

C. Other Missing Facts.

The other glaring omission from the Statement of the Case and the Complaint is the absence of any allegation that the joint check agreement was actually created or that Mark failed to pay Stark everything that Mark owed Stark. There is, in fact, no allegation that Stark claims Mark failed to abide by the terms of its subcontract. Thus, the adventure on which the Petitioners encourage this Court to embark is based on a claim in which there is no allegation that Respondent Tri Capital ever had a contractual obligation to pay Stark's trust fund contributions and no claim by Stark that Mark violated any material terms of their contract.

II

SUMMARY OF ARGUMENT

The Court should reject the Petition to resolve a non-existent split in the Circuits on issues it resolved less than

two years ago. The essence of the Petition for Writ of Certiorari is that Petitioners are unsatisfied with the remedies which Congress afforded them in 1980 by the addition of ERISA § 515, 29 U.S.C. § 1145 (hereafter "ERISA § 515") in the Multi-Employer Pension Plan Amendments Act of 1980 (Pub.L. 96-364 (1980), hereafter "MPPAA"). Bills to provide Petitioners with the remedy they seek from this Court have been continuously pending in Congress since 1991, and none have been passed. Impatient with the legislative process, Petitioners want the Court to judicially re-write the definition of "employer" under ERISA § 3(5), 29 U.S.C. § 1001, to expand remedies under ERISA § 515, and thereby abandon its unanimous decision in *Nationwide Mutual Life Ins. Co. v. Darden*, 503 U.S. ___, 117 L.Ed.2d 581 (1992) (*Darden*).

Secondary to this issue is a request to repudiate the Court's ERISA preemption and removal doctrines. Petitioners want a separate rule when the subject matter of the dispute is a contribution to an employee benefit plan. Petitioners have difficulty arguing that the California lien and stop notice statutes which are specifically designed to facilitate collection of ERISA plan contributions do not "relate to" those plans. 29 U.S.C. § 1144(b) is not a factor because no current exemption exists. Thus, the Petitioners actually request this Court to repudiate the line of ERISA preemption cases which began with *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85 (1983).

Finally, Petitioners raise the interesting notion that there was something inappropriate about resolution of their ERISA action in federal court. The trust funds' extremely narrow reading of *Metropolitan Life Ins. Co. v.*

Taylor, 481 U.S. 58 (1987), has already been rejected by this Court in *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133 (1990). It was the Petitioners, after all, who amended their complaint to state the ERISA claim under 29 U.S.C. § 1132(a) and 29 U.S.C. § 1145. The district court, in granting Respondents' motion to dismiss pursuant to Fed. R. Civ. Proc. 12(b)(6) rendered a judgment on the merits. *Federated Department Stores, Inc. v. Moitie*, 452 U.S. 394, 399 N.3 (1981). Petitioners claim, in effect, that the district court lacked subject matter jurisdiction to determine the claim they raised under 29 U.S.C. § 1132(a)(3) because of the removal of the artfully pled ERISA contribution collection action.

Without putting too fine an edge on the matter, it is difficult to find anything worthy of this court's consideration in these issues.

III

ARGUMENT

The sense of *deja vu* which the Court may be experiencing in reviewing this Petition is quite natural. The Court decided the most significant questions of law raised in this case two years ago, when it held that it would construe the term "employee" as it appeared in § 3(6) of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1002(6), as incorporating the traditional agency law criteria for identifying master-servant relationships. *Nationwide Mutual Ins. v. Darden*, 503 U.S. ___, 117 L.Ed.2d 581, 587 (1992). It would be anomalous to decide now that the definition of "employer" under the same statute should be determined under a different approach.

The scope of ERISA preemption and the nature of complete preemption and jurisdiction on removal issue raised by this Petition have also been decided in the recent past. This Court held in 1983 that claims which relate to employee benefit plans are preempted by ERISA in the absence of a statutory exception. *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85 (1983). The Court has re-affirmed this position on at least several occasions thereafter. *See District of Columbia v. Greater Washington Board of Trade*, ___ U.S ___, 121 L.Ed.2d 513 (1992); *Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133; *FMC Corp. v. Holliday*, 498 U.S. 53; *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58 (1987); *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41 (1987); *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724 (1985). The *Taylor* case, *supra*, re-affirmed that where, as here, federal preemption is complete, federal question removal jurisdiction exists.

That the Court has recently heard and decided all of the significant issues raised by Petitioners here is undeniable. That Petitioners ask this Court to consume scarce and precious space on its docket to re-hash these issues is inexcusable.

A. There Is No Split In the Circuits on the Definition of "Employer" Under Either ERISA § 3(5) or § 515.

There is no conflict between the Circuit Courts of Appeals who have considered whether a non-union general contractor such as Mark is the ERISA "employer" of its subcontractors within the meaning of either ERISA § 3(5) or § 515, 29 U.S.C. §§ 1002(5) and 1145. Indeed, the

only two Courts of Appeal which have addressed the question specifically presented here are the Ninth and Eleventh Circuits, and the decisions from those courts are easily reconcilable as Petitioners concede. Compare, *Laborers Local 938 Joint Health and Welfare Trust Fund v. B.R. Starnes Co.*, 827 F.2d 1454, 1457 (11th Cir. 1987); *Xaros v. U.S. Fidelity and Guaranty Co.*, 820 F.2d 1176, 1179 (11th Cir. 1988); with the Ninth Circuit's decision in this case below. The only distinction between the Eleventh Circuit's approach and the Ninth Circuit's decision in this case is that the Ninth Circuit declined to adopt a bright line rule whereby execution of the appropriate collective bargaining agreement was the necessary condition precedent to status as an ERISA employer in all situations. That the Ninth Circuit declined to fully embrace the Eleventh Circuit's approach does not help Petitioners here.

Petitioners' speculation as to what other Circuit Courts of Appeal would do if presented with the issue in this case (see Petitioners' Brief, p. 8) is not the equivalent of the conflict between the Circuits which this Court had in mind in drafting Rule 10.1(a). Neither Petitioners' reliance on legislative history (rather than the text of the statute) nor a string of outdated and easily distinguishable cases involving expired collective bargaining agreements can alter this outcome.

Petitioners' total reliance on *Massachusetts Laborers Health and Welfare Fund v. Starrett Paving Corp.*, 845 F.2d 23, 24-25 (1st Cir. 1988) ("*Starrett Paving*"), is grossly misplaced. The First Circuit's views on the definition of "employer" in *Starrett Paving* were a passing reference which did not affect the outcome of the decision. More

importantly, events have overtaken this passing reference in the form of this Court's decision in *Darden, supra.* The key passage in *Starrett Paving* noted:

> We previously left open the question of how to interpret ERISA's definition of "employer" § 1002(5). [cites omitted]. Were we to decide that question now, we should likely side with the plans, accepting the interpretation of our district courts. The legislative history of ERISA shows that when Congress enacted ERISA in 1974, it copied the definition of 'employer' from ERISA's 1958 predecessor, the Welfare and Pension Plan Disclosure Act [cite omitted] and, as far as we can tell, the drafters of the 1958 Act copied FLSA. Before Congress enacted ERISA in 1974, several courts had adopted a 'broader-than-common-law' interpretation of the definition and two Supreme Court opinions used 'economic reality' language. [cite omitted] . . . These factors seem sufficient to warrant similar interpretations of the language defining 'employer' in the two statutes. Thus, we shall assume (but we need not definitely decide) that for purposes of § 1145, appellant Starrett is an 'employer' under § 1002(5).

Massachusetts Laborers Health and Welfare Fund v. Starrett Paving, 845 F.2d at 24-25. *Starrett Paving* dealt with whether an owner of a union signatory corporation could be held individually liable for the corporate employer's delinquent contributions.

This dicta in *Starrett Paving* was published without the benefit of this Court's decision in *Darden,* specifically rejecting arguments that the ERISA definition of "employee" should be given the same meaning as that

term had under the Fair Labor Standards Act, 29 U.S.C. § 203(d). This Court held:

> While the FLSA, like ERISA, defines an 'employee' to include 'any individual employed by an employer,' it defines the verb 'employ' expansively to mean 'suffer or permit to work' [cite omitted]. This latter definition, whose striking breadth we have previously noted, [cite omitted] stretches the meaning of 'employee' to cover some parties who might not qualify as such under strict application of traditional agency law principles. ERISA lacks any such provision, however, and the textual asymmetry between the two statutes precludes reliance on FLSA cases when construing ERISA concepts of 'employee.'

503 U.S. ___, 117 L.Ed.2d at 591. The obvious linkage between the definitions of "employer" and "employee" necessarily compels the same analysis in defining both terms. Thus, whatever value the dicta in *Starrett Paving* and the cases it referred to for support had, disappeared when this Court decided *Darden*.

The other cases on which Petitioners rely as cited on pages 10 through 12 of their brief are easily distinguishable on their facts. Those cases involve either an expired collective bargaining agreement and/or a specific undertaking executed between the party to be charged with the delinquent contributions and either the union or the trust funds seeking those contributions. This situation is a far cry from that presented by a non-union general contractor's joint check agreement with a subcontractor to avoid state lien liability.

In the final objective analysis, the only Circuit conflict presented is in the future and merely potential. It seems unlikely in the extreme that this potentiality will ripen in the face of this Court's decision in *Darden*.

B. Petitioners' Request to Legislate Notwithstanding Congress' Refusal to Do So Should Be Denied.

Petitioners' fallback position is that review should be accepted because the Ninth Circuit's ruling conflicts with Petitioners' understanding of the intent of ERISA § 515. Petitioners scatter phrases such as "undoubted purpose of section 515", "the larger reasons for its enactment", and the statute's "larger purpose" throughout their brief. This argument rises to a crescendo bemoaning the "departure from the legislative history" and condemning the Ninth Circuit's decision below because it "discards the Congressional purpose of enacting section 515, and turns the statute on its head." Conspicuously absent from this line of argument are (1) an allegation that the Ninth Circuit decision violates the language which Congress adopted to describe its intent or (2) specific references to legislative history of ERISA § 3(5) defining "employer" to include non-union general contractors.

The only expression of Congressional intent that matters here is the text of the statute itself. Where the statute's language is plain, the sole function of the Court is to enforce it according to its terms. *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241 (1987). As this Court has noted, the best evidence of Congressional intent is the statutory text adopted by both Houses of Congress and

submitted to the President. *West Virginia University Hospitals v. Casey*, 499 U.S. 83, 98 (1991). This is true because the purpose of a statute includes not only what it sets out to change, but also that which it resolves to leave alone. *Id.*

There is nothing ambiguous about ERISA § 515's remedy. Entities like Petitioners are permitted to pursue employers with a contractual obligation to contribute and recover contributions, attorneys' fees, costs, and certain other forms of remedies provided for under 29 U.S.C. § 1132(g)(2). Those remedies against the employer are, however, the exclusive remedy which Congress chose to provide to trust funds like Petitioners. Similarly, there is nothing ambiguous about Congress' definition of the term "employer".

More importantly, for purposes of the petition, there is nothing to suggest that the Ninth Circuit's interpretation of that term is inconsistent with the language of the statute. The vague reference to the legislative history of the statute and Petitioners' efforts to encourage the Court to seek out larger purposes, motivations and goals, is nothing more or less than an invitation to legislate.

This court has specifically rejected this approach recently in *West Virginia University Hospitals v. Casey*, 499 U.S. 83 (1991). There, as here, Petitioner's argument was, in effect, that if Congress did not include the additional remedies sought, it would have done so had Congress thought about it. In rejecting this principle of "statutory construction," the Court quoted Justice Brandeis in *Iselin v. United States*, 270 U.S. 245, 250-251 (1926), which held:

> The statute's language is plain and unambiguous. What the [petitioner] asks is not a

> construction of a statute, but, in effect, an enlargement of it by the court, so that what was omitted, presumably by inadvertence, may be included within its scope. To supply omissions transcends the judicial function.

Petitioners are asking this court to legislate.

The Court's reluctance should be even greater when, as here, Congress, itself, has specifically chosen to refrain from taking the action which the Petitioners urge. From 1991 to the present, Congress had before it legislation that would have specifically amended ERISA to permit precisely the kind of lawsuit which Petitioners filed. *See* HR 2782, 102d Cong., 1st Sess. (1991); HR 1036, 103d Cong., 1st Sess. (1993); S. 1580, 103d Cong., 1st Sess. (1993). Thus, the rule of law which Petitioners urge this Court to consider has been pending before Congress in one form or another for the last four years. None of the three bills has passed.

This legislative activity establishes the folly of Petitioners' arguments to this Court. Their concerns are being addressed and debated in the appropriate forum, the Congress of the United States. This Court should reject the effort to circumvent the legislative process in the guise of judicial interpretation.

IV

THE NINTH CIRCUIT APPROPRIATELY APPLIED THIS COURT'S WELL-ESTABLISHED RULES CONCERNING ERISA PREEMPTION AND REMOVAL JURISDICTION

The threshold problem with Petitioners' argument regarding ERISA preemption and removal jurisdiction is

that it is not nor can it properly be before the Court due to Petitioners' strategic decisions. The question regarding preemption and removal jurisdiction should have been raised in response to the original complaint. Although the outcome would not change, it could, at least, be said that the issue is properly before the Court.

Petitioners' insurmountable problem is that they selected the one response to the District Court's first order which precluded it from being subsequently reviewed. Petitioners could have withdrawn the request for leave to amend and proceeded with an appeal of both the original dismissal and denial of the motion to remand. Petitioner could also have sought an interlocutory appeal pursuant to 28 U.S.C. § 1292(b). Neither of these two options would have precluded Petitioners from filing their separate ERISA action for contributions against Respondent Mark.

For better or worse, Petitioners, by requesting leave to amend the originally dismissed complaint and adding an ERISA collection and breach of fiduciary duty claim under 29 U.S.C. § 1132, waived whatever complaints they may have had regarding the original removal. As Petitioners were aware, the claims they brought against Mark were within the exclusive subject matter jurisdiction of the federal court pursuant to 29 U.S.C. § 1132(e)(1). Consequently, the only jurisdiction in which this combined action could have been heard was in the United States District Court. As the masters of their complaint and the parties who made the strategic decisions resulting in the procedural setting, Petitioners cannot now be heard to complain that the outcome was waiver of the remand issue.

Petitioners need not be unduly upset about this waiver as the issue waived was hopeless from the outset. In the abstract, the parties could agree that the scope of ERISA preemption is not unlimited and that removal jurisdiction exists under the complete preemption doctrine, where the federally preempting statute also provides a claim for the conduct. In this case, the claim would be the ERISA § 515 action for non-payment of ERISA trust fund contributions. Neither of these notions is a new or surprising development in the law pertaining to ERISA or federal question removal jurisdiction.

Petitioners' request for relief suffers from several fatal defects. First, the Petitioners' analysis is based on a reading of this Court's decisions which finds no support in the text of the opinions. Second, Petitioners are not the first to raise these issues, and this Court has already published opinions unambiguously reinforcing its views on ERISA preemption and federal question removal jurisdiction.

Petitioners do not argue the existence of a split in the Circuits or conflict with the decisions of this Court. Instead, Petitioners complain about the interpretation which this Court has placed upon language which was passed by Congress and signed by the President.

The core of Petitioners' dispute with the remand decision is their belief that in *Metropolitan Life Insurance Co. v. Taylor*, 481 U.S. 58 (1987), this Court found that the complete preemption doctrine applied only to ERISA claims cases as to which concurrent jurisdiction exists. *See* Petitioners' Brief, p. 17, *et seq.* No such limitation is discernable either from the text of this Court's opinion or the logic of its analysis.

It is also apparent from this Court's decisions in *Ingersoll-Rand v. McClendon*, 498 U.S. 133 (1990) and *FMC Corp. v. Holliday*, 498 U.S. 52 (1990), that the Court has already rejected the analysis essential to success on the merits of Petitioners' claim. The state statutes in question here serve no purpose other than to allow ERISA covered employee benefit plans like the Petitioners to attempt to collect delinquent contributions owed to them by signatory employers from other sources. Here, as in *Ingersoll-Rand*:

> We are not dealing here with a generally applicable statute that makes no reference to, or indeed functions irrespective of the existence of an ERISA plan. . . . Here, the existence of a pension plan is a critical factor in establishing liability under the state's . . . law. As a result this cause of action relates not merely to pension benefits, but to the essence of the pension plan itself.

498 U.S. 139-140.

Petitioners' argument that ERISA preemption is limited to state laws that affect plan terms, conditions or administration flies directly in the face of both *Ingersoll-Rand*, and this Court's earlier decision in *Mackey v. Lanier Collections Agency and Service, Inc.*, 486 U.S 825 (1988). The statutes in question here are not general collection statutes but rather statutes which are specifically directed at facilitating the collection of ERISA trust fund contributions from third parties.

In *FMC Corp. v. Holliday*, this Court also rejected arguments similar to those raised by Petitioners here regarding a state anti-subrogation statute. The issue in

Holliday was whether a state law could be used to prevent ERISA plans from recouping assets paid for benefit claims notwithstanding subrogation provisions in the plan documents. The Court had little difficulty in finding that the state laws related to the employee benefit plans within the meaning of 29 U.S.C. § 1144(a). Here as in *FMC Corp.*, the subject of the state statute was collection in favor of ERISA covered employee benefit plans. Admittedly, the state statute in *FMC Corp.* prohibited the collection and the state statutes here purport to permit collection. One of the bedrock principles of ERISA preemption has been that preemption is not avoided simply because a state law aids rather than obstructs an ERISA plan's administration. *See, e.g., Metropolitan Life Insurance Company v. Massachusetts*, 471 U.S. 724, 739 (1985).

This Court has also rejected the notion that ERISA preemption is avoided because state law remedies for ERISA covered conduct are different than those provided under ERISA itself. The remedies provided under § 502 of ERISA, 29 U.S.C. § 1132(a), are the exclusive remedy for rights guaranteed under ERISA. *E.g., Ingersoll-Rand v. McClendon*, 498 U.S. 133, 144 (1990); *Pilot Life Insurance Company v. Dedeaux*, 481 U.S. 41, 54 (1987). Thus, when Congress added ERISA § 515 providing the remedies under 29 U.S.C § 1132(g)(2), those remedies became the exclusive remedies available under the statute.

It becomes evident that this Court has decided the precise issue which Petitioners seeks to raise in this case. The rights protected under ERISA § 510, 29 U.S.C. § 1140, at issue in *Ingersoll-Rand* and the rights guaranteed under ERISA § 515, 29 U.S.C. § 1145, are each enforced through ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3). For this Court's

purposes, and ERISA jurisdiction, there is no difference, analytically, between the issue Petitioners raise and the one the Court resolved in *Ingersoll-Rand, supra.* That the California stop-notice statutes at issue here provide greater remedies than those available under 29 U.S.C. § 1132(a)(3) does not exempt the statutes from ERISA preemption any more than the additional remedies which the plaintiff sought in *Ingersoll-Rand* caused the Texas common law claim to be immune from ERISA preemption.

Another factor compelling the conclusion that the issue Petitioners raise is not significant is ERISA's jurisdictional structure. Where the ERISA claim presented does not fit within 29 U.S.C. § 1132(a)(1)(B), the only court which can hear the claim is the federal court. A finding that complete preemption did not support removal jurisdiction would mean the claim could not be heard. Apart from the lack of logic in this approach, it would be in direct conflict with 28 U.S.C. § 1441(e) which was added to permit federal courts to hear actions removed from state courts that did not have subject matter jurisdiction over the claim.

Petitioners' problem is not with the Ninth Circuit's analysis, but rather with the legislation which Congress enacted as interpreted by this Court.

V

THIS IS NOT AN APPROPRIATE CASE FOR THIS COURT TO REVIEW EVEN IF IT HAS RESERVATIONS ABOUT THE NINTH CIRCUIT'S DECISION

This Court has exercised its power to grant Writs of Certiorari sparingly and more often than not to rectify

mischief in the administration of justice which has the potential for significant nationwide negative impact. Similarly, if silently, the Court no doubt avoids cases where the disruption from granting Certiorari exceeds the good which can be accomplished. Respondent respectfully submits that regardless of the Court's views on the merits of this case, granting the Petition for Writ of Certiorari in this case would be a very bad idea.

The language which exists in the subcontract at issue between Mark and Stark is not unique. General contractors nationwide use similar language to protect themselves from the risk of being forced to pay twice on labor and materials by operation of state mechanics' lien statutes. The definition of employer in ERISA is also similar to the definition of employer in the National Labor Relations Act, 29 U.S.C. § 152(2) among other federal statutes regulating the employment relationship. Straying from *Darden* now would raise far more questions about a concept basic to federal labor law than the Court could hope to answer in one case. This similarity of definitions and the ubiquitous frequency with which joint check agreements are used in the construction industry militates against granting Certiorari in this case even if the Court believes that the term "indirectly in the interests of the employer" in the ERISA definition requires some exploration.

The notion that a garden variety joint check agreement between a non-union general contractor and its union subcontractors could make the general the "employer" of the subcontractor's employees would have a number of immediate and potentially negative consequences. How, for example, would a general contractor make the delinquent contribution payments without running afoul of 29

U.S.C § 186(a)? If the contractor could not avoid employer status through a joint check agreement, and the joint check agreement is the primary means for avoiding mechanics' lien liability, the logical solution for the general contractors would be to refrain from using union subcontractors. It is unlikely that such a response would improve the funding of multiemployer benefit plans.

It is also worth considering the impact which would occur with respect to the general contractor's employees and benefit plans. The construction of the term "employer" which Petitioners urge on this Court would, if adopted, apply to the general contractor's plans and likely spill over to the tax side of ERISA affecting everything from minimum/maximum contribution rules, reporting and disclosure requirements to non-discrimination rules, and prohibited transaction requirements among others. As this court has noted from time to time, portions of ERISA may not be a model of legislative drafting, but it is nonetheless an integrated and interlocking scheme. Simply granting the petition for Writ of Certiorari in this case may have destabilizing consequences well beyond what the parties or the Court could anticipate in advance.

In the final analysis, Petitioners are attempting to use this Court to accomplish goals which they were unable to accomplish or did not attempt with the 1980 MPPAA amendments creating ERISA § 515. The rule of law sought has also eluded Petitioners despite substantial progress in both the 102nd and 103rd Congress.

Granting the petition here should lead to affirmance of the Ninth Circuit's decision for the reasons stated in the Court of Appeal's decision, thereby wasting the Court's

precious resources. It could also lead to an exercise in judicial legislation in a complex area with mechanism which are ill-suited to gaining a full appreciation of all the consequences which would flow from reversal of the decision in question.

VI

CONCLUSION

Respondents respectfully request that the Court either summarily affirm the Ninth Circuit's decision in this case, or in the alternative, deny the Petition for Writ of Certiorari.

DATED: November 4, 1994.

Respectfully submitted,

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